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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. ~~357~~ 85.

CITIES SERVICE GAS COMPANY, a Corporation,
Appellant,

vs.

STATE CORPORATION COMMISSION OF KANSAS, HARRY SNYDER, JR., Chairman, RICHARD C. BYRD and JOHN I. YOUNG, As Members of Said Commission, and Their Respective Successors in Office, *Appellees.*

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

MOTION TO DISMISS OR AFFIRM

and

STATEMENT IN OPPOSITION TO APPELLANT'S MOTION TO REVERSE.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 797.

CITIES SERVICE GAS COMPANY, a Corporation,
Appellant,

vs.

STATE CORPORATION COMMISSION OF KANSAS, HARRY SNYDER, JR., Chairman, RICHARD C. BYRD and JOHN I. YOUNG, As Members of Said Commission, and Their Respective Successors in Office, *Appellees.*

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

MOTION TO DISMISS OR AFFIRM

and

STATEMENT IN OPPOSITION TO APPELLANT'S MOTION TO REVERSE.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Kansas is reported in 180 Kan. 454, 304 P. 2d 528. A copy is set forth in Appendix "A" attached hereto. That court attached to its opinion the memorandum opinion of the State Corporation Commission of the State of Kansas, which thus

appears in 180 Kan., at 464, 304 P. 2d at 536, and at pp. xvi to xxiii of Appendix "A" hereto.

Judgment was entered by the District Court of Finney County sustaining the order of the State Corporation Commission without opinion (R. 97-99).

JURISDICTION.

Jurisdiction is asserted under 28 U. S. C. A. 1257(2), 62 Stat. 929.

QUESTIONS PRESENTED.

As to Dismissal:

1. Should this court accept jurisdiction to review a judgment of the Supreme Court of Kansas which rests on the adequate non-federal basis that the state order complained of is not and will not be interpreted as applying to appellant or to any of its operations?

2. Should this court accept jurisdiction to review a judgment of the Supreme Court of Kansas when the decision of the state court, construing the state order complained of, put appellant beyond the range of possible state action under the order, thus leaving no case or controversy remaining for this court's determination?

As to Affirmance:

3. Does the Natural Gas Act[1] (which expressly prohibits regulation by the Federal Power Commission "of the production or gathering of natural gas") preclude state action regulating production and admittedly neces-

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[1] 15 U. S. C. A. 717, 52 Stat. 821.

sary to conserve gas, prevent waste and protect correlative rights in a common underground reservoir?

4. Does a state gas conservation order infringe upon valid Federal Power Commission jurisdiction to regulate certain sales in interstate commerce, when such state order is directed to those persons only who lift or take raw natural gas from an underground common source of supply, is construed and applied only to require the attribution of a minimum value to reservoir gas, is admittedly necessary for conservation and for protection of correlative rights, and fixes no price and establishes no rate?

STATUTES INVOLVED.

A copy of the state conservation order complained of is set forth in Appendix "B". There is also set forth as Appendix "C" Section 55-706 of Article 7, Chapter 55, G. S. Kansas, 1949, the Kansas statute under which the order was subsequently construed by the State Corporation Commission in separate proceedings set forth in Appendix "D" hereto.

STATEMENT.

Throughout its presentations,[2] appellant has consistently assumed an interpretation of the Kansas order contrary to the construction placed upon it by the Supreme

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[2]Appellant has filed, in addition to its Jurisdictional Statement, a "Motion to Reverse Final Judgment of the Supreme Court of Kansas." Appellees' objections thereto are set forth at p. 41 herein.

Court of Kansas in its decision in this cause and contrary to an interpretation placed upon it by the State Corporation Commission in dismissing proceedings by others seeking to apply the order to appellant's operations. (Pleadings and orders in these proceedings are set forth in Appendix "D".) Consequently, a summary of the evidence leading to the order, as contained in the record, and of the history of its application, is necessary for an understanding of the issues involved both as to dismissal and as to affirmance.

Peculiar Distinguishing Characteristics of Kansas Hugoton Gas Field.

The dominance of a few pipeline monopolies resulting in an artificial buyer's market and consequent waste and prodigal use of gas is the distinguishing characteristic of the field. The inability of landowners and producers of gas to bargain with these pipeline monopolies except on their own terms early led to unilateral price-fixing on the part of the monopoly interests. As a result, gas was produced as a virtually valueless commodity, far below its actual value by any fair test or measure, without regard to the value which would have been attributed to it in the atmosphere of a free, competitive market. In the absence of state regulation, these conditions are perpetuated indefinitely into the future through the early device of life-of-production contracts. (R. 250-253, 258-261, 272, 281, 284-285, 310-311, 316, 321, 322, 443, 448, 466, 479-486, 512-513, 518, 519-520, 523-572, 174-179; Ex. 4, p. 1, R. 381, R. 231-233; Ex. 19, R. 403; R. 297, 303-304, 317).

The record, as summarized below, supplies a knowledge of the physical characteristics of Kansas Hugoton gas and its history of exploitation which is necessary for an understanding of how these monopolies grew to

dominance and for an understanding of the measure, herein challenged but admittedly effective, reasonably designed to correct the physical, economic, underground and other waste and violations of correlative rights resulting from the exercise of such monopoly power.

Hugoton Gas Field in Kansas Is Underground Common Source of Supply.

The Kansas Hugoton Gas Field is an underground common source of supply of natural gas, over 2400 feet below the surface, all portions of the field being interconnected through porous underground structures. It is not a geographical surface area. A few wells could physically drain the entire reservoir. (R. 307-309, 465, 475-478, 501).

Hugoton Gas Cannot Be Stored.

The gas is highly volatile. Upon production, it immediately escapes into the air unless contained under pressure. Unlike other fuels, such as oil or coal, it cannot be stored on the surface, in tanks or stockpiles, to await a demand or market. It must be retained in its original state underground or, if produced, must immediately be put into pipelines. (R. 252, 313, 480-481, 512-513, 518).

Hugoton Gas Cannot Be Transported Except Through Established Pipelines.

The gas cannot be trucked or transported over highways or by rail. The only means of transporting it is by means of established pipelines. (R. 242, 278, 285, 313, 480-481, 512-513, 518).

Limited Wellhead Demand for Hugoton Gas.

The inability to transport Hugoton gas other than through pipelines limits the wellhead demand to those outlets which are connected to an ultimate consumer market at tremendous outlays of capital. A consumer market by means of pipeline can be secured only at a cost of $25,000,000.00 or more. In addition, it is necessary to be assured of sufficient reserves of gas, committed to a pipeline, to amortize this cost over a period of twenty or more years and to assure an investor's profit. (R. 258-259, 278-279, 313-315, 460, 480-486, 502-503, 518).

Abundant Wellhead Supply of Hugoton and Resulting Destructive Competition Among Producers and Landowners.

During the early history of the field, two or three pipeline companies, with pipelines in the area, acquired production of their own and began producing substantial quantities of gas. Once the reservoir was tapped by them, the owners of undeveloped but proven acreage began drilling wells of their own in order to prevent their properties from being drained. The longer the delay the greater became the drainage by the pipeline companies owning wells of their own. (R. 251-252, 258-260, 312-315, 479-480, 517-518, 537-573).

Merely drilling a well did not, however, solve the independent producer's or landowner's drainage problem. It is not economically feasible for the owner of even the largest well to build a pipeline to transport his gas to even the nearest consumer market. Neither the production nor the reserves are adequate to justify the investment. Consequently, the only way in which an individual well owner could market his gas and protect himself from drainage was to obtain a connection with an already existing pipeline

outlet. If the price offered by a pipeline was just sufficient to amortize the cost of drilling the well and to give some return, no matter how small, it was better for the independent producer or landowner to develop the property than to allow the gas to be lost to him forever by drainage through wells on neighboring lands owned and operated by the pipeline company itself. A compulsion to drill resulted in a destructive competition for pipeline outlets among sellers of gas. Gas was forced to be sold at the lowest minimum that would amortize the drilling investment. A multitude of independent owners balanced what a few pipeline companies considered the gas to be worth, against the certainty of drainage. Decisions to develop were made without regard to demand conditions. (R. 251-252, 258-260, 281, 284-285, 299, 310-311, 321, 479-480, 512-513, 517-518, 519-520).

Interaction of Destructive Competition Among Producers and Pipeline Monopolies.

The result of the interaction of destructive competition among sellers of gas and the virtual monopoly enjoyed by the few pipeline companies was and is an available supply of wellhead gas greatly in excess of demand. (R. 312-313, 480, 481-483, 512-513, 518).

History of Growth of Pipeline Monopolies Making Gas a Distress Commodity.

Landowners whose gas was being drained through the pipeline companies' own production on neighboring lands demanded development. Independent producers completed commercial gas wells, but the pipeline companies refused to transport gas belonging to others. Wells of independents remained unconnected for years while the pipeline companies, through drainage, produced the gas from beneath

the independents' unconnected wells. A few pipelines having been established to tap the common reservoir, it was not economically feasible to build any number of competing lines. After huge investments were made by independents in acquiring leases, drilling and completing wells, the wells were closed in for lack of a market. Independents lost their leases because they could not prevent drainage and could not stand the financial loss of further development without assurance of being able to market the gas. In many such instances, the pipeline companies, who had the only market, then secured leases themselves on the same lands. As for the landowner, accepting any royalty benefits was better than having the gas drained from under his land through a well located on his neighbor's farm without compensation to him of any kind or character. Production had substantial value only to the pipeline companies. With increased consumer demand at the other ends of their pipelines, pipeline companies gradually took a new approach. They still refused to transport the gas of others. They also refused to buy the gas of others. But they agreed to "bail-out" the independents by buying leases at their investment cost in the wells alone, without interest, and without regard to the investment in the leases themselves, or the bonuses or delay rentals already paid. The pipelines would pay for the well at such price, and payment would be made at the low rate of 3 or 4 cents per thousand cubic feet of the gas, now owned by the pipeline company, produced from that very well. After years of struggle, pipeline companies began purchasing gas of others, but only on certain conditions. One condition was that the gas be "dedicated" and sold to them during the life of the wells. The second condition was that, regardless of changing market or economic conditions, the gas would be considered as having the same value perpetually. These contracts are known as fixed-price, life-of-production con-

tracts, and many of them, with prices as low as four cents per thousand cubic feet, still control the wellhead price in the field. (R. 252-253, 281, 283-285, 537-573, 578-583, 586-588, 591-592, 615, 616, 620, 625-626, 630).

Lack of Free, Open, Competitive Market for Hugoton Gas.

Supply and demand have not established a competitive price. There is no free, open, competitive market for gas in the Kansas Hugoton Field. The wellhead value privately and unilaterally attributed to gas under such distress conditions is substantially below its fair and reasonable worth or value in a free market. In the absence of state action, the gas is treated as a commodity of little value without regard to the value which would be attributed to it by private arms-length bargaining in a free, competitive market. (R. 215, 219-220, 250-254, 273, 281, 284-285, 299, 304, 316, 321, 443, 480-487, 492, 512-513, 518-520, 525-528, 541-542, 562).

Effect of Distress Conditions upon Conservation.

Since gas was dealt with under these distress conditions as a commodity of little value, exploration and development was discouraged. Development of proven acreage was retarded. Drainage became extensive. Full depletion and exhaustion of wells was unlikely. Excessive leakage in pipelines was common. It did not pay to save the gas. Gas was consumed in inferior uses. Domestic consumers were deprived of this premium fuel by reason of its use in carbon black plants which sprang up in the area, its use as "dump gas" in large and inefficient industrial furnaces, and by reason of similar uses. Wasteful practices, such as the "blowing" of wells, were common. Gas began to be consumed at a rate one hundred times faster

than other forms of energy in proportion to known reserves. (R. 179-180, 198-202, 205-206, 211, 242-281, 310-311, 315, 319-320, 321-323, 371-374, 444-446, 478-479, 488-491, 499-501, 506-522).

Value of Natural Gas in Kansas Hugoton Gas Field.

The evidence revealed that the value of natural gas at the wellhead in the field, based on free, competitive market conditions, was upwards of fourteen cents. The evidence included many exhaustive and extensive studies by highly competent engineers, marketing experts, economists, and practical gas people, of recent sales of gas most nearly reflecting competitive conditions, of the value of competing fuels whose prices are established in a free market, and of the source costs of various fuels on an equivalent energy-content basis, based on free market conditions. (R. 154-180, 183-186, 216-221, 223-234, 281-304, 317, 381-391, 392-393, 394-396, 397-403).

Importance of Conservation of Hugoton Gas.

The record contains extensive evidence regarding the necessity to conserve natural gas, the irreplaceable nature of natural gas, the qualities which make it the nearest perfect fuel, the reserves of natural gas in Kansas and elsewhere, the importance of gas to the economy of Kansas and the United States, the rapid rate of exhaustion of the Hugoton Field, the relationship between value-attribution and conservation and the prevention of waste, the interests of consumers in conservation, and the minimum value which must be attributed to natural gas in order to prevent its waste. (R. 161-162, 178-183, 198-202, 203-212, 215-216, 223-225, 233-234, 241-242, 242-281, 309-312, 315-317, 319-320, 322-323, 324-327, 371-379, 395, 396, 424, 431, 443-446, 450, 464-465, 467, 478-479, 488-491, 499-501, 506-522, 531-532).

The economic history of the United States is fundamentally a history of rapid exploitation of immensely valuable natural resources. The possession and exploitation of these resources have greatly affected American character, economic development, and even political and social institutions. Whatever pre-eminence the United States may have among the nations of the world, in industrial activity, efficiency and enterprise, in standards of comfort in living, in wealth, and even in such social and educational institutions as are dependent upon endowments, must be attributed to the possession of these great natural resources; and the maintenance of our pre-eminence in these respects is dependent upon a wise and economical use of remaining resources. (R. 507-508).

While natural resources lying within our borders provide the basic means for our high standards of living, the relationship between the resources in any given community and the welfare of that community depend on the policy followed in respect of those resources. If they are exploited carefully and wisely with due regard to the future, they may be of rich benefit to the community as well as to the nation. Americans have seldom followed such a policy. We have exploited most resources wastefully with little or no regard to the future. As a result, in many communities resources have been used in such a manner as finally to make an area worse depressed than it would have been had it not had the resource. Oil regions in Pennsylvania, Ohio and Indiana, and some gas-producing areas in Kansas are in worse condition than they would have been had there been no oil or gas there. (R. 256-257, 508).

Natural Gas Is an Irreplaceable Natural Resource.

Not all of our natural resources are irreplaceable. Forests can be produced at about three times the present price

of lumber. But natural gas is irreplaceable in the sense that it cannot be made. Manufactured gas, of different composition, can be made at fifty times the cost or price of natural gas. Manufactured gas can be produced only as long as we have coal. (R. 245, 509).

Natural Gas Is the Nearest Perfect Fuel.

Natural gas comes nearest being the perfect fuel. It possesses many qualities which cause purchasers to prefer it to other fuels. It does not need to be stored on the consumer's premises, as do coal and oil. It is the cleanest of the three major fuels. Under ordinary conditions, it burns with no smoke, even if carelessly used. Gas leaves no ashes to be removed; there is little or no dust. The high temperature obtained from gas is achieved almost instantly, which is not possible with either coal or oil. The use of gas permits the local application of heat, either for space heating or for ranges, and with inexpensive installations. Gas insures uniformity of heating value during the life of the field from which the supply is obtained. Gas can be used for refrigeration. Speedy and accurate thermostatic control is possible with little or no attention. Gas is adaptable to use for intermittent high and low temperatures required in industry, such as burning gypsum to make plaster or in the ceramic industry or in the annealing of metals, where ranges of temperatures and precise heats are needed. Consequently, products of uniform quality may be produced by the use of gas. Some of the many advantages named cause gas to compare favorably with both oil and coal; some, with oil or coal; but gas has all these superior features and none of the unfavorable features of either coal or oil. (R. 161-162, 215-216, 254-255, 257-258, 431, 516, 531-532).

Reserves of Natural Gas.

Unfortunately, the present known reserves of this premium fuel on a heat content basis are only a small fraction of the total reserves of all forms of fuel in the United States, including oil and coal. The known reserves of gas are approximately two-tenths of one percent of the total reserves of fuels. (R. 488).

The total known reserves of coal, including all grades, has recently been estimated to be 2,536 billion tons. The equivalent figure for natural gas, based on heating value, would be 5 billion tons. Recognizing variables and uncertainties in estimating reserves, it is not difficult to come to the conclusion that gas reserves will furnish only a very small fraction of the nation's fuel supply. Natural gas can only be regarded as a "flush production" fuel which cannot be expected to hold up to the demand. In spite of these facts, during 1940, the energy production of gas in the United States amounted to 4,200 trillion Btu, and that of coal amounted to 15,600 trillion Btu. In 1946, the energy production of gas was approximately twenty-five percent of the energy production of coal. We are, therefore, using our gas energy resources at a rate of one hundred times faster than our coal resources in proportion to reserves. (R. 488-489).

In Kansas, the ultimate gas production in the Hugoton field is estimated at around 15 trillion cubic feet. (R. 309-310, 478-479, 500-501). The present known oil reserves in the entire state of Kansas are slightly in excess of 600 million barrels. A barrel of oil contains approximately six million BTU. On a heat value basis the 15 trillion cubic feet of gas in the Hugoton Field is equivalent to 2,500,000,000 barrels of oil. In other words, the Hugoton field contains the equivalent of 2,500,000,000 barrels of oil, as compared

with the total known reserves of oil in Kansas of 600,000,000 barrels. The heating value in the Kansas Hugoton Field is approximately four times that of the known oil reserves in the state of Kansas. Gas is the dominant fuel produced in Kansas. (R. 500-501).

Effect of the 1949 Minimum Value Attribution Order on Conservation.

In 1949, the Commission entered an 8-cent minimum value attribution order.[3] The order resulted in substantial conservation and prevention of waste. Marked development occurred in marginal or peripheral acreage, with a promise of much greater ultimate recovery from the underground reservoir. Increased development reduced drainage, and this afforded greater protection of correlative rights. An immediate reduction occurred in low grade uses and low grade carbon black plants were eliminated. Care began to be taken in completing wells so as to diminish the loss of large quantities of gas allowed to be blown into the atmosphere. Greater care was taken to prevent leakage in pipes. Curtailment of the use of gas for "dump gas" purposes in low grade industrial furnaces resulted. More gas was available for domestic and other higher uses. (R. 311-312, 324-327, 371-379).

Perpetuation of Distress Conditions.

The monopolistic and inherently wasteful practices of the pipeline companies were still, however, perpetuated through the life-of-production contracts, and the lack of a

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[3]The record in this cause, as submitted for judicial review, includes an abstract of the proceedings and evidence in the Commission's Docket No. 35-154-C, Conservation Division, which is the docket in which the 8-cent order was promulgated. (R. 419, 97).

free market continued. (R. 215, 251-253, 258, 284-285, 299-300, 303, 316). Bargaining under such distress conditions still did not result in recognition of the fair and reasonable value of gas in a free market. (R. 162-180, 212-234, 257, 258, 281-304, 317, 381-404). Recent arms-length contracts more nearly reflecting competitive conditions were, at the time of the hearing in this cause, based on a wellhead value of approximately 14 cents. (R. 281-304, 337). Notwithstanding such increased competition, the four-cent values, in the absence of state action, are perpetuated under the life-of-production contracts. (R. 284, 316, 321, 523-573, 615, 616, 620-621, 626, 630).

Based upon the foregoing and other evidence, the State Corporation Commission of the State of Kansas issued, on December 2, 1953, the conservation order, effective January 1, 1954, challenged by this appeal. (Appendix "B").

The Order Involved.

The order complained of is not directed to appellant and does not apply to its operations. The basic controlling fact is that appellant has no production in and produces no gas from the Kansas Hugoton Gas Field. (R. 9).[4]

That the order is not applicable to appellant or its operations is apparent (1) from the plain language of the order; (2) from the construction placed upon the order by the Supreme Court of Kansas in the decision sought to be reviewed herein; and (3) from recent interpretive orders of the State Corporation Commission of Kansas specifically holding that the order was not and is not directed to ap-

[4]This is admitted in the Jurisdictional Statement (pp. 5-6) but the effect of the admission is obscured by reference to appellant's production elsewhere.

pellant or to its operations, and dismissing complaint proceedings brought against appellant alleging appellant's continuing refusal to obey the order.

Language of Order.

Discussing first the plain language of the order, it is addressed and directed to "all persons, firms or corporations which take gas or cause gas to be taken from the Hugoton Gas Field in Kansas".[5] The "Hugoton Gas Field in Kansas" is not a geographical surface area, but an underground reservoir of raw natural gas located in porous limestone and dolomite formations over 2400 feet below the surface of the earth. (R. 307, 425-426, 475-476). Before Cities Service Gas Company acquires possession or ownership of the gas, it has already been taken out of the underground reservoir constituting the Hugoton Field by the persons, firms or corporations who sell and deliver the gas to it. (R. 9). It is apparent that before the gas is delivered to appellant production has been completed.

Again, the plain language of the order merely establishes "a condition precedent for withdrawal from the common source of supply."[6] Appellant Cities Service Gas Company, owning no production and producing no gas, does not withdraw gas from the common source of supply (R. 9).

In the memorandum Decision of the Commission, which was made a part of the Order,[7] the Commission emphasized that the proceeding in which the order was entered was not a rate case and that the state commission "does not possess nor seek to possess jurisdiction over rates for the

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[5]Appendix "B," p. xxx.

[6]Appendix "B," p. xxx.

[7]Appendix "A," p. xxx.

sale of gas in interstate commerce,"[8] and that "We are not here fixing a price for gas in the field, a maximum price, a fair field price or a going price * * *."[9]

Construction of Order by Supreme Court of Kansas.

Coming now to the order as construed by the Supreme Court of Kansas in entering the judgment sought to be appealed, the court expressly states that the order does not apply to the operations of appellant.[10]

The Supreme Court of Kansas, further construed the order as follows:[11]

> "* * * we have no difficulty in construing its terms to mean that no person, firm or corporation—first of all the producer—*can lift or take gas in its natural state* from the depths of the Hugoton Field to a point further than the wellhead without, *as a condition precedent to its withdrawal* from the common source of supply, first attributing thereto a minimum price of not less than eleven cents per M. c. f. * * *" (180 Kan. 454, at 461, 304 P. 2d 528, at 534. Italics added).

Unsuccessful Attempt to Apply Order to Appellant's Operations in Subsequent Proceedings.

The orders of the State Corporation Commission in its Docket No. 52,417-C, Conservation Division, previously mentioned, set forth in Appendix "D", conclusively demonstrate that the order complained of is not directed to Cities

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[8]Appendix "A," p. xxi.

[9]Appendix "A," p. xxiii.

[10]Appendix "A," pp. xiv-xv. The court's language in so holding is set forth later herein, pp. xxiii-xxiv.

[11]Appendix "A," pp. xi-xii.

Service Gas Company and does not apply to its operations.[12]

On June 8, 1956, a petition and complaint was filed by certain landowners seeking an interpretation and construction of the order applying it against appellant Cities Service Gas Company and its operations. The allegations were that appellant, by refusing to pay or attribute the minimum value required thereunder, was violating the order;[13] that within the meaning of the order, Cities Service Gas Company, as a purchaser of gas, was taking gas or causing gas to be taken from the field;[14] that Cities Service had failed to pay or attribute the minimum value or price required by the order and was thus in violation of and in contempt of the order.[15]

Magnolia Petroleum Company, one of the producers from whom Cities Service purchases gas in Kansas, was also complained of. The relief sought was an order directed at both producer and purchaser requiring retroactive and continuing payments, pursuant to the order, as a condi-

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[12]Recognition is given by this court to the latest interpretive orders of a state regulatory body with reference to an order questioned on review in this court. *Phillips Petroleum Co.* v. *Cabot Carbon Company*, 348 U. S. 867, 99 L. Ed. 682, 75 S. Ct. 105. See the same case below in *Cabot Carbon Company* v. *Phillips Petroleum Co.*, 114 F. Supp. 953 and *Phillips Petroleum Co.* v. *Cabot Carbon Co.*, (10 Cir.), 210 F. 2d 841. For the interpretive order see *Cabot Carbon Co.* v. *Phillips Petroleum Company*, Okla. , 287 P. 2d 675.

[13]Appellant's actions in this regard are detailed in Exhibit "A" attached to the petition and complaint. Appendix "D," pp. xxxix-xl.

[14]Paragraph numbered 5 of the petition and complaint, Appendix "D," p. xxxiv.

[15]Paragraphs numbered 10, 12, 16 of petition and complaint, Appendix "D," pp. xxxvi-xxxvii.

tion precedent to further withdrawal, and for an interpretation of the order.[16]

By order of June 13, 1956,[17] the Commission having examined the petition and complaint, found that it related to alleged violations of the 11-cent order;[18] and that the order was a conservation and prevention-of-waste order,[19] and that petitioners and complainants should be required to show cause on a date certain why the proceeding should not be dismissed as to Cities Service Gas Company.[20]

A show cause hearing was had on June 13, 1956, and Cities Service Gas Company appeared and was heard.[21] After the hearing and on July 18, 1956, the Commission entered a further order finding that the petition related to the interpretation or enforcement of an order of the Commission and the determination of rights thereunder;[22] and the Commission made such interpretations, in the light of the petition and complaint, in order to determine whether it established a *prima facie* case as against Cities Service.[23] The Commission held that the order had never been and is not interpreted (1) as applying to purchasers as well as to producers of gas, or (2) as a price-fixing order

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[16]Appendix "D," pp. xxxviii-xxxix.

[17]Appendix "D," pp. xli-xlii.

[18]Appendix "D," p. xli (Finding 1).

[19]Appendix "D," Finding 4, p. xli.

[20]Appendix "D," Finding 5, pp. xli-xlii.

[21]Order of July 18, 1956, Finding 1; Appendix "D," pp. xlii-xliii.

[22]Order of July 18, 1956, Finding 3; Appendix "D," pp. xliii-xliv. The Kansas Statute giving the Commission jurisdiction, upon petition of interested parties, to interpret, enforce or determine rights under its orders is G. S. Kan. 1949, 55-706, set forth in Appendix "C," p. xxxi.

[23]Order of July 18, 1956, Finding No. 4, Appendix "D," p. xliv.

regulating sales at the wellhead and sales after gathering.[24] It further found "That the 'Hugoton Gas Field in Kansas' within the meaning of the order * * * is an underground common source of supply of raw, natural gas located * * * in formations * * * 2700 to 2800 feet below the surface of the earth,"[25] and "That the gas referred to in said order is raw, natural gas so located and so situated in said underground reservoir and common source of supply."[26] It further found that after the taking, withdrawal and production of such gas has been completed, Cities Service purchases the gas;[27] that Cities Service does not, within the meaning of the order, take gas or cause gas to be taken from the underground field, and does not withdraw gas therefrom and is not a producer of gas within the meaning of the order.[28]

The commission further interpreted the order as dealing only with production and withdrawal in the interests of conservation and protection of correlative rights in the reservoir;[29] that it fixed no price for gas and established no rates.[30] The petitioners and complainants had asked

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[24]Order of July 18, 1956, Findings 6, 2, Appendix "D," pp. xliii, xliv.

[25]Order of July 18, 1956, Finding No. 8; Appendix "D," pp. xliv, xlv.

[26]Order of July 18, 1956, Finding No. 9; Appendix "D," p. xlv.

[27]Order of July 18, 1956, Finding No. 11; Appendix "D," p. xlv.

[28]Order of July 18, 1956, Finding No. 12; Appendix "D," p. xlv.

[29]Order of July 18, 1956, Finding No. 13; Appendix "D," pp. xlv-xlvi.

[30]Order of July 18, 1956, Finding No. 16; Appendix "D," p. xlvi.

for relief against both Cities Service the purchaser, and Magnolia, the owner of the production, requiring retroactive payments,[31] similar to the relief afforded by the Oklahoma Corporation Commission to the Panoma Corporation in the order reviewed by this court in *Natural Gas Pipeline Co.* v. *Corporation Commission of Oklahoma et al.*, 349 U. S. 44, 99 L. Ed. 886, 75 S. Ct. 576. Unlike the Oklahoma Commission, the Kansas Commission denied all such relief as to both the producer and Cities Service.[32] The proceedings were, however, set down for further hearing to permit the petitioners and complainants to show cause further why the proceeding in its entirety, should not be dismissed as to Cities Service.[33]

After still another hearing, at which all parties were present, and on August 31, 1956, the complaint, in its entirety, was dismissed as to Cities Service Gas Company.[34]

It thus appears that in the only instance in which the 11-cent order was sought to be applied to Cities Service Gas Company or its operations, the regulatory body which issued the order has refused to grant relief based upon its

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[31]Petition and Complaint; Appendix "D," at p. xxxviii.

[32]Order of July 18, 1956, Findings 14-17 and corresponding orders, Appendix "D," pp. xlvi-xlvii. The petitioners and complainants specifically pointed out in an application for rehearing the Kansas Commission's failure to construe the order as the Oklahoma Commission had construed its order. Appendix "D," pp. xlviii-liii. The Kansas Commission, however, refused to construe the Kansas order as a well-head price-fixing order and overruled the petition for rehearing. Order of August 10, 1956, Appendix "D," pp. liii.

[33]Order of July 18, 1956, Finding 19 and corresponding order; Appendix "D," p. lvii.

[34]Order of August 31, 1956; Appendix "D," pp. liv-lv.

own interpretation of the order, on the ground that it was not applicable to the operations of Cities Service.[35]

In its attempt to vest this court with jurisdiction, appellant ignores (1) the language of the order, (2) the construction of the order by the Supreme Court of Kansas, and (3) the construction placed upon the order by the Commission itself in the only proceeding in which the order was sought to be applied to appellant's operations and enforced against it. Instead, appellant, in the first sentence of its Jurisdictional Statement (p. 1) refers to the order as a "gas price-fixing order * * * applied to the operations of appellant." Under the caption "Jurisdiction" (p. 3) it again asserts that the order applies to its operations as a "gas price-fixing order." In its statement of "Questions Presented" (p. 4) the order is once more described as one

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[35]The Cities Service Gas Company moved that the entire proceedings be dismissed on the ground that the order had been construed by courts of competent jurisdiction as applying to it as a purchaser of gas and as a price-fixing order regulating sales and that by reason of such prior construction the Commission had no jurisdiction to construe or interpret the order in any other manner; that such required construction caused the order to violate federal statutory and constitutional provisions and made the order void and of no force and effect; and that since the Commission had no jurisdiction initially to promulgate the order, it had no jurisdiction to construe it. Order of July 18, 1956, Finding No. 2; Appendix "D," p. xliii. (This court will observe that the identical argument regarding the judgment of the District Court of Finney County, Kansas, in this cause, as being a construction of the order applying it to appellant's operations was unsuccessfully made in the case at bar. See portion of discussion of Supreme Court of Kansas, quoted herein at pp. 23-24). Appellant Cities Service Gas Company filed a motion for rehearing objecting to the Commission's assumption of jurisdiction to construe its own order. (Appendix "D," pp. lv-lix). On September 24, 1956, the Commission denied rehearing. (Appendix "D," p. lx). Cities Service then filed an appeal to the District Court of Finney County, Kansas (Appendix "D," pp. lxi-lxxi), which is now pending.

fixing a price to appellant, either at the wellhead or after production and gathering have been completed, and as one requiring Cities Service Gas Company to pay such price.

MOTION TO DISMISS.

Appellees move the court for an order dismissing this appeal on the ground that the judgment below rests on an adequate non-federal basis and on the ground that the attempted appeal does not present a substantial federal question.

1. This Court Should Not Accept Jurisdiction to Review a Judgment of the Supreme Court of Kansas Which Rests on the Adequate Non-Federal Basis That the State Order Complained Is Not and Will Not Be Interpreted As Applying to Appellant or to Any of Its Operations.

Although the opinion below discusses at some length an alleged conflict between state action and federal power, an adequate non-federal basis for the actual judgment of the court is readily discernible. This court does not pass on federal questions discussed in a state court's opinion where it appears that the judgment rests on adequate state grounds. *Black* v. *Cutter Laboratories*, 351 U. S. 292, 298, 100 L. Ed. 1188, 1196, 76 S. Ct. 824.

The Supreme Court of Kansas affirmed the District Court's judgment, and in so doing, it interpreted the order of the Commission. The court specifically held that, on the record before it, the order did not apply to appellant's business:

> "Finally appellants contend that the trial court in rendering its judgments determined the price order in question *applied to the operations of the Gas Com-*

pany. We do not agree. Resort to its judgment, heretofore quoted, discloses that all it did was uphold and sustain the order of the Commission, aimed at curtailing production in the Hugoton Field and based expressly on the premise the Commission was not fixing a price for gas in the field but prescribing a minimum price for all gas at the wellhead as a condition precedent for withdrawals from the common source of supply in the interest of conservation." (180 Kan. 454, 463, 304 P. 2d 528, App. xiv-xv, Italics added)

This interpretation of the law of Kansas cannot be questioned. *Hotel & R. E. Int. A.* v. *Wisconsin E. R. Board*, 315 U. S. 437, 86 L. Ed. 946, 62 S. Ct. 706.

Regardless of any at-large discussion by the court below of allegedly conflicting state and federal power, the discussion was unnecessary to the decision of whether the order complained of is applicable to this appellant. The court below squarely held that the order does not so apply, and in so doing, it foreclosed any possible contention by appellant that the order deprives appellant of protection afforded by federal law. The order does not require appellant to do, or to refrain from doing, any act. Appellant states[36] that it is in danger of suffering penalties prescribed by the Kansas Statutes. Such penalties may be imposed upon those who violate an order of the Commission. The Supreme Court of Kansas has decreed that the order does not apply to the operations of appellant, and the Kansas Commission has expressly refused to apply it to appellant in a proceeding complaining that appellant's operations violate the order. Under these circumstances, it is difficult to credit the appellant with sincerity in its expression of fear of penalties. The possibility of infliction of any pen-

[36]Appellant's "Motion to Reverse Final Judgment of the Supreme Court of Kansas," p. 6.

alties has been denied by the very judgment of which appellant now seeks review.

Appellant's contrived and baseless ground for invoking the appellate power of this court is clearly revealed by its attempts to ignore the actual judgment below. Appellant is obviously not asking this court to reverse the judgment holding the challenged order inapplicable to its operations. This construction of Kansas law by Kansas' highest tribunal adequately disposes of any actual case or controversy here involving appellant, but appellant is not satisfied with the decision on this record. It seeks the opinion of this court as to hypothetical situations which might give rise to controversies in the future, and ignores the adequate non-federal basis for the judgment presented for review.

2. This Court Has No Jurisdiction to Review a Judgment of the Supreme Court of Kansas When the Decision of the State Court, Construing the State Order Complained Of, Put Appellant Beyond the Range of Possible State Action under the Order, Thus Leaving No Case or Controversy Remaining for This Court's Determination.

This court should not assume jurisdiction of this cause for the reason that no question is presented arising from any actual case or controversy. *Muskrat* v. *United States*, 219 U. S. 346, 31 S. Ct. 250, 55 L. Ed. 246. The fact that the state court may have discussed a federal issue apart from an actual case or controversy will not satisfy the requirement for this court. *Doremus* v. *Board of Education*, 342 U. S. 429, 434, 96 L. Ed. 475, 480, 72 S. Ct. 394.

Despite the unequivocal holding of the court below that the Commission's order, as construed by it, has no ap-

plication to appellant's operations, appellant still seeks to challenge the order so construed. It appears to fear possible injury from the order, despite the decision below, but there is nothing in the record passed on below, and here now for review, to substantiate such fears. If ever such fears should prove justified, the appellant can invoke the aid of courts in the context of an actual case or controversy.

The only conceivable way in which appellant might be affected by the order is through the effect of the order upon others with whom appellant deals. If, in response to the order, others should violate rights of appellant, appellant could seek judicial enforcement of its rights, and the validity of the order relied upon could be determined in an actual case or controversy in which appellant's rights and interests were at stake. But such a case or controversy was not reviewed below and it is not presented for review now. Applicable here are the language and holding in *International L. & W. Union* v. *Boyd*, 347 U. S. 222, 223-224, 98 L. Ed. 650, 652, 72 S. Ct. 447:

> "* * * Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. * * *"

What appellant seeks here is not a reversal of the judgment below holding the administrative order inapplicable to it. Appellant desires assurance that the order will not apply in hypothetical situations in which appellant may be involved at some future time. To now resolve such a conjured situation would not only dispense with the requirement of case or controversy, but it would also mean the resolution of questions involving Kansas law which have not been passed upon by Kansas courts.

The many corollaries of the requirement of case or controversy are all applicable to this appeal. They are exhaustively stated and supported in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384.

No set of facts which could justify appellant's expressed fears have materialized, and the courts below have not interpreted the Commission's order in the light of any such facts.

Appellant has sustained no injury. Possible future injury is belied by the very judgment complained of. Further, as we have shown, in an action before the State Commission in which attempt was made to specifically apply the order to appellant, that body ruled that the appellant could not be reached under the order. Appellant has never felt the pinch of any state action predicated upon the order presented for review. Unless every constitutional, statutory and judicial inhibition upon this court's appellate power is now ignored, appellant has no standing to obtain review by this court.

MOTION TO AFFIRM.

Appellees move the court, in the alternative, for an order affirming the judgment of the Supreme Court of Kansas on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The questions will be discussed together.

3. **Does the Natural Gas Act (Which Expressly Prohibits Regulation by the Federal Power Commission "of the Production or Gathering of Natural Gas") Preclude State Action Regulating Production Admittedly Necessary to Conserve Gas, Prevent Waste and Protect Correlative Rights in a Common Underground Reservoir?**

4. **Does a State Conservation Order Infringe upon Valid Federal Power Commission Jurisdiction to Regulate Certain Sales in Interstate Commerce, When Such State Order Is Directed to Those Persons Only Who Lift or Take Raw Natural Gas from an Underground Common Source of Supply, Is Construed and Applied Only to Require the Attribution of a Minimum Value to Reservoir Gas, Is Admittedly Necessary for Conservation and for Protection of Correlative Rights, and Fixes No Price and Establishes No Rates?**

That the Kansas order was and is necessary and required in the interest of conservation and prevention of waste is not disputed in this cause. It is admitted.[37] In

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[37]In its petition for review instituting this action, appellant urged among other grounds that the evidence was not sufficient to justify the order and did not prove the order was necessary to prevent waste and protect correlative rights and attacked the Commission's findings and conclusions to that effect. (R. 90-97). When appeal was taken to the Supreme Court of Kansas, appellant expressly limited the appeal to the federal question now sought to be presented. (R. 139). As noted by the Supreme Court of Kansas, "all other issues raised below have been abandoned," Appendix "A," p. viii, and "we must and do assume, the evidence before the Commission was sufficient to sustain its findings

the face of the compelling record of evidence summarized above, appellant could hardly deny it. Yet appellees somehow suffer from the admission. Demonstration of facts is sometimes more convincing than an opponent's admission. The admission without explanation of the facts leaves the order in a vacuum.

It is important to appellees and their cause that this court understand that the order was not made in a vacuum, and that it was clearly necessary and reasonably designed to prevent the wasteful and inefficient depletion of the rapidly vanishing reserves of the Kansas Hugoton Gas Field, once proudly referred to by Kansans as the world's largest natural gas reservoir. (R. 424). The record shows that the waste and inefficient depletion of this irreplaceable natural resource results from conditions peculiar to the Kansas Hugoton Field. The history of the wasteful development and exploitation of the field, as disclosed in the record, is one of long-continued monopolistic practices carried on by a few large pipeline companies owning production of their own; of destructive competition among a multitude of small producers and landowners facing drainage with no pipeline markets of their own; of the continued perpetuation of distress conditions into the indefinite future through the abusive provisions of fixed-price, life-of-production contracts, and of the resulting waste of reservoir gas disposed of as a virtually valueless commodity.

Appellant's admission of the necessity for the order includes a clear recognition, without stint or quibble, that the minimum value attribution order effectively achieves the desired end, which is conservation, prevention of

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to the effect the involved * * * was necessary and required in the interest of conservation and prevention of waste of gas in the Hugoton Field." (Appendix "A," p. xi).

waste and the protection of correlative rights in the natural gas reservoir.

Before 1938, when the Natural Gas Act was passed, it was already well established that production of oil and gas "is essentially a mining operation and therefore is not a part of interstate commerce even though the product obtained is intended to be and is in fact immediately shipped in such commerce," and that state orders regulating production designed to prevent waste and protect correlative rights in a common source of supply are not in violation of the Commerce Clause of the Constitution. *Champlain Refining Co.* v. *Corporation Commission*, (1931) 286 U. S. 210, 235, 76 L. Ed. 1062, 1078-1079, 52 S. Ct. 559.[38]

The basic purpose of the exemption from the Federal Power Commission's jurisdiction of "the production or gathering of natural gas" was "to preserve in the States powers of regulation in areas in which the states are constitutionally competent to act * * *. Clearly among the powers thus reserved to the states is to regulate the physical production * * * of natural gas in the interests of conservation or of any other consideration of local concern. It was the intention of Congress to give the states full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that

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[38]See *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510, 522, 57 S. Ct. 364; *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 288, 71 L. Ed. 1049, 47 S. Ct. 639; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 177-184, 76 L. Ed. 1038, 1045-1048, 52 S. Ct. 548; *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 178, 67 L. Ed. 929, 935, 43 S. Ct. 526; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 258-261, 67 L. Ed. 237, 242-243, 43 S. Ct. 83.

process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach." *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, 690, 91 L. Ed. 1742, 1748, 67 S. Ct. 1482.

This court has repeatedly pointed out that the Natural Gas Act was designed to take no authority from state commissions and was so drawn as to complement and in no manner usurp state regulatory authority, but that the purpose of the Act was, rather, to fill the "gap" in regulation of natural gas companies resulting from judicial decisions prior to 1938 which prohibited, on federal constitutional grounds, state regulation of many of the interstate aspects of the natural gas business. *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591, 609, 610, 88 L. Ed. 333, 348, 349, 64 S. Ct. 281; *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 514-521, 92 L. Ed. 128, 136-140, 68 S. Ct. 190; *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 503-504, 93 L. Ed. 1499, 1503-1505, 69 S. Ct. 1251; *Federal Power Commission v. East Ohio Gas Co.*, 338 U. S. 464, 472, 473, 94 L. Ed. 268, 277, 278, 70 S. Ct. 266; *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, 682, 98 L. Ed. 1035, 1048, 74 S. Ct. 794.

The decisions recognized by this court as creating the "gap" (notable among which were *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. Ed. 1027, 44 S. Ct. 544 and *Public Utilities Commission v. Attleboro Steam and Electric Co.*, (1926) 273 U. S. 83, 71 L. Ed. 549, 47 S. Ct. 294) were decisions in which state regulatory bodies had attempted rate regulation over sales in interstate commerce. No such gap existed or has been recog-

nized to exist by this court with respect state action regulating production in a common source of supply in the interests of conservation and the protection of correlative rights. There was no "gap" to fill in this area. The state's power in this area remained unimpaired by the Natural Gas Act which, by its explicit terms, banned Federal Power Commission jurisdiction over "the production or gathering of natural gas."

This attempted appeal is an effort, under the guise of alleged conflict between state action and federal statute, to carve out a new hiatus or gap, a new no-man's land, within which the state cannot act and within which Congress has not acted. This effort is directly opposed to the intention of Congress in passing the Natural Gas Act.

The Kansas order regulates production only, not sales. The withdrawal, which is regulated, is withdrawal in the process of and before completion of production. The order is addressed to those who actually reach into the ancient dolomite structures, over 2400 feet below the surface, and first take physical possession of the raw natural gas. Price-fixing remains in private or other public hands. Price fixing, whether done privately or by public authority, will continue to be done after consideration is given to all factors which enter into the establishment of either prices or rates, including the amount of reserves, the volume of available production, the cost of production, the cost of gathering and other relevant factors. Conservation requires only the recognition of a minimum value at the wellhead as a condition precedent to withdrawal, and this is so whether there is a subsequent sale or otherwise. The Kansas order reaches gas before it has begun to move in commerce of any kind.

The order involved in the *Panoma* case,[39] on which appellant relies, was directed to the sale of residue gas after production and gathering, as well as processing, had been completed. Furthermore, the order was a direct regulation of sale, in that it directed the purchaser, Natural Gas Pipe Line Company of America, to make a back payment of over one million dollars and to make payments in the future based on the minimum rate so fixed as a condition precedent to such sale. The order in the case of *Natural Gas Pipeline Company of America* v. *Corporation Commission of the State of Oklahoma*, 349 U. S. 44, 99 L. Ed. 866, 75 S. Ct. 576, was also an order regulating the sale of residue gas after production and gathering, as well as processing, were completed. In each instance the order involved was construed and applied by Oklahoma as a direct price-fixing order, applying to sales, after production and gathering had ended.

As stated by this court in reviewing Oklahoma orders, (349 U. S. at 44-49, 99 L. Ed. at 867)

> "In these cases Oklahoma has attempted to fix a minimum *price to be paid* for natural gas, *after its production and gathering* has ended, by a company which transports the gas for resale in interstate commerce. We held in *Phillips Petroleum Co.* v. *Wisconsin*; 347 U. S. 627, 98 L. Ed. 1035, 74 S. Ct. 794, that *such a sale and transportation* cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission." (Italics added).

In the *Phillips* case, this court also held that "production and gathering in the sense that those terms are used in Section 1(b) [of the Natural Gas Act], end before the sales by Phillips occur." (347 U. S. at 678, 98 L. Ed. at 1045).

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[39] *Natural Gas Pipe Line Company of America* v. *Panoma Corporation*, 349 U. S. 44, 99 L. Ed. 866, 75 S. Ct. 576.

In the case at bar, the Kansas Commission has expressly refused to apply its minimum value attribution order to the purchase of gas by appellant, although it was urged that the purchase was a "taking" within the meaning of the order. It has found that appellant is in no way in contempt of the order and is in no way violating it, even though its purchases from the producer are at prices less than the amount of minimum value required to be attributed. Unlike the Oklahoma Commission, it has refused to treat the order as a rate order or as one changing the price provisions in the contracts which appellant has with producers. It has refused, therefore, to require "back payments" or payments in the future as a condition of purchase. In short, the Kansas Commission has refused to construe or apply the order as one regulating any sale of gas, at the wellhead or elsewhere, or as a rate order fixing the price to be paid by appellant.

In these respects, the order involved in this cause also differs markedly from the Oklahoma orders involved in *Cities Service Gas Company* v. *Peerless Oil and Gas Co.*, 340 U. S. 179, 95 L. Ed. 190, 71 S. Ct. 215 and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, 95 L. Ed. 204, 71 S. Ct. 221, as well as from the previous eight cent Kansas order involved in *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704, Reh. den. 170 Kan. 341, 225 P. 2d 1054; See *Columbian Fuel Corp.* v. *Panhandle Eastern Pipe Line Co.*, 176 Kan. 433, 271 P. 2d 773.

The difference between the two Oklahoma price-fixing orders and the Kansas 11-cent value attribution order is readily seen by comparing the two tax cases of *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396 and *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 71 L. Ed. 1049, 47 S. Ct. 639.

The Oklahoma orders were construed by the Oklahoma Commission and the Supreme Court of Oklahoma and by them applied as regulating the "taking" of gas into interstate commerce after production and gathering had ended and as imposing a direct obligation upon the "takers" (purchasers) to pay the price prescribed. As such they fell within the area forbidden to the states. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396.

The distinction between the care with which a commodity is exploited or used—conservation—and the value placed on that commodity by those who exploit or use it—value attribution—is by now well recognized. West Virginia thought that federal rate-making should use price as a tool to achieve conservation. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281. This court disagreed, stating in its opinion: "We have searched the legislative history of the Natural Gas Act for any indication that Congress entrusted to the Commission the various considerations which West Virginia has advanced here. And our conclusion is that Congress did not." 320 U. S. at 609, 88 L. Ed. at 348-349. The court, having in effect told West Virginia that the Federal Power Commission could not use its rate-making authority to solve that state's conservation problem, then pointed out that the Act "took no authority from State Commissions" and was "so drawn as to complement and in no manner usurp State regulatory problems." It pointed out that "the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." 320 U. S. at 610, 88 L. Ed. at 349.

The *Hope* case demonstrates that the Natural Gas Act was not designed or intended to give the Federal Power Commission conservation powers. The Court stated, at

one point, that it was not unmindful of the interests of the producing states in their natural gas supplies and again assured West Virginia that the Act did not intrude in the area traditionally reserved for control by state commissions. 320 U. S. at 612-613, 88 L. Ed. at 350.

Mr. Justice Jackson, dissented, pointing out the irreplaceable nature of natural gas and the imperative necessity for its conservation. He stated:

> "We should recognize 'price' for what it is—a tool, a means, an expedient * * *. The fact is that in natural gas regulation price must be used to reconcile the private property right society has permitted to vest in an important natural resource with the claims of society upon it—price must draw a balance between wealth and welfare * * *." (320 U. S. at 653, 88 L. Ed. at 372.)

But Mr. Justice Jackson's considerations did not prevail, and the states were left with the problem.

Since the *Hope* case, the relationship between realized value and conservation has become well recognized. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 95 L. Ed. 190, 71 S. Ct. 215; *Phillips Petroleum Co.* v. *State of Oklahoma*, 340 U. S. 190, 95 L. Ed. 204, 71 S. Ct. 221. Another such recognition is found in *City of Detroit* v. *Federal Power Commission*, 230 F. 2d 810, cert. den. 352 U. S. 829, 1 L. Ed. 2d 48, 77 S. Ct. 34, reviewing a Federal Power Commission rate order. There the commission, on a conservation theory, allowed the natural gas company a so-called "field price" or "commodity value" for its own produced gas as an operating expense. The Court of Appeals pointed out that the primary aim of the Natural Gas Act was to guard the consumer against excessive rates. The court recognized the relationship between field price and conservation, but stated:

"* * * We should not be understood to say that whenever the Commission does establish the necessary relationship between means and end, a prescribed rate increase will be lawful. In view of the primary orientation of the Act toward the maintenance of low prices for the consumer, *we do not preclude the possibility that a rate increase might be unlawful even though no lower rate could encourage gas production by pipeline companies.* * * *" (230 F. 2d, at 818) (Italics added).

It is apparent, from the *Hope* Case and the case just cited, that the Natural Gas Act prohibits the Federal Power Commission from the free exercise of conservation powers. If appellant prevails here, Kansas will also be enjoined from the free exercise of conservation powers and a new no-man's land will exist in an area where action is admittedly vitally necessary for the preservation of a rapidly diminishing natural resource.

If the Federal Power Commission on some rate-making theory should actually choose to occupy the area within which the state has acted here, it would not only be in violation of the Natural Gas Act, but the action would be a substantial interference with the exercise by the state of its regulatory functions, and therefore (*Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690, 91 L. Ed. 1742, 1748, 67 S. Ct. 1482) "the jurisdiction of the Federal Power Commission does not attach."

It is readily apparent that the Federal Power Commission and the Kansas Corporation Commission are complementary instrumentalities having their own separate and unrelated field of regulation. They are not rivals competing with one another in the same field of endeavor.

Regulatory agencies in rate cases are concerned only with "price" and "cost." The cost to the first purchaser

is only one of the many costs involved in a gas rate case before the Federal Power Commission. Other costs are those of labor, transportation and material and supplies. The Federal Power Commission has no more authority to look behind otherwise valid state regulations which might affect the first cost of gas than it would have to look behind state minimum wage acts. If appellants' theory were carried to its lo gical conclusion, there would be a conflict between every federal rate-fixing authority and the administrators of all state minimum wage laws.

The cost of gas has the same kind of effect in a gas rate case before the Federal Power Commission as the cost of coal or diesel oil has in a railroad rate case before the Interstate Commerce Commission or as the cost of gasoline has in an air carrier rate case before the Civil Aeronautics Board. Who would suppose that either the Interstate Commerce Commission or the Civil Aeronautics Board could issue conservation orders to protect the supplies of coal, diesel oil or gasoline used by the utilities under their supervision? Yet, if appellant's theory were carried to its logical conclusion, this might well be the result.

If the Kansas Commission cannot use well-established value attribution principles to bring about the desired conservation objective, waste will continue to exist. Certainly Congress did not "close the gap" for the purpose of opening a new one when it passed the Natural Gas Act.

In a rate case, the regulatory body is not concerned with the effect of the rate on conservation or the prevention of waste. It is concerned only with the specific rate charged to the consumer. The regulatory body is concerned with investment and expenses and return on invested capital. It is concerned with "cost" or "price," irrespective of value. If the electric utility or a railroad is

using a precious fuel prodigally because it can be obtained under distress conditions, so much the better for the rate-payers. The regulatory body would have no concern to make the railroad pay more for coal or oil in the interest of conservation. That would be the function of some other authority.

On the other hand, in a conservation matter, a regulatory body is concerned with "value" and the effect of its order on conservation and the prevention of waste, irrespective of "price" or "cost." A conservation order deals with only the conservation and prevention of waste of the resource. It is concerned with and determines the extent to which a commodity must be treated as a commodity of value, rather than what its "cost" or "price" may be. "Value," "price" and "cost" are each determined by different factors and in any given case may be greatly dissimilar.

The question becomes, who should use the tool of value attribution in a particular gas reservoir? If the Federal Power Commission uses the tool, it must be in terms of price-fixing and rate regulation. But sections 4 and 5 of the Natural Gas Act provide the standard for that regulation. *Federal Power Commission* v. *Hope Natural Gas Co., supra.* These sections require "just and reasonable" rates to consumers, and as pointed out in *City of Detroit* v. *Federal Power Commission,* 230 F. 2d 810, at 818, under these sections a rate increase might be unlawful *even though no lower rate could encourage conservation.* Thus the full use of the tool (if it may be used at all under the Natural Gas Act) is denied the Federal Power Commission.

On the other hand, conservation has been traditionally the concern of the states, and the Natural Gas Act reserved for the states control over "production and gathering of

natural gas." We respectfully submit that federal regulation can hardly be expected to function efficiently in face of such peculiar problems as exist in the Kansas Hugoton Field and as disclosed in the record. The Natural Gas Act has been in effect since 1938. An entirely new generation has been born and is now in college. "All has been merry" and the "goose has hung high" for consumers and gas companies alike, but "almost unnoticed by the consuming public" and national authorities, wasteful and prodigal practices have continued in the Kansas Hugoton Field to the extent that, if not curtailed, the field will reach its maximum production in 1963, with a rapid decline thereafter. (R. 450). We respectfully suggest that the Kansas Commission faced up realistically to the nature and peculiarity of the resource intrusted to its care, under our federal system, and has issued an order which will foster and nurture the field for future generations of consumers. Kansas has taken proper and courageous action effectively to conserve this treasure of nature, and in so doing, has recognized the limitations imposed upon it by our federal system.

The existence of a power makes possible its abuse. No one can read this record and believe that the power has been abused here, and there is no such contention. The courts are always available to strike down abuse, and this is so whether the abuse emanates from Washington or from Topeka, Kansas.

For these reasons, the judgment below should be affirmed on the ground that it fails to present a substantial federal question.

STATEMENT IN OPPOSITION TO APPELLANT'S MOTION TO REVERSE FINAL JUDGMENT OF SUPREME COURT OF KANSAS.

Certainly, if the court is not already convinced that this appeal should be dismissed or the judgment below affirmed on Appellee's motions contained on these pages, Kansas is entitled to full hearing. Summary disposition, as suggested by "Appellant's Motion to Reverse Final Judgment of the Supreme Court of Kansas" would be most inappropriate, particularly in view of the unanimous opinion of the Supreme Court of Kansas containing a well-reasoned analysis of the decisions of this court and recognizing their controlling effect.

If the law were well settled in appellant's favor, it would not have felt compelled to misrepresent and ignore the actual nature and impact of the Kansas order in its presentations here. Appellant's motion is an obvious effort to fortify an indefensible position.

In addition, the determination of this appeal necessarily involves the balancing of important national and state interests which cannot be adequately dealt with by summary order, striking down state action resulting from years of study and experience.

Obviously, if the Supreme Court of Kansas is wrong, something more on this entire subject needs to be said by this Court in order that Kansas and others may be guided in future conservation efforts. Summary reference to existing decisions of this Court would be of no aid in this regard.

CONCLUSIONS.

This appeal should be dismissed on the grounds that the judgment below rests on an adequate non-federal basis and the appeal does not present a case or controversy. The state order does not apply to appellant or its operations.

The judgment below should be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Appellant's Motion to Reverse Final Judgment of Supreme Court of Kansas should be denied.

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APPENDIX "A."

No. 40,402

CITIES SERVICE GAS COMPANY, a corporation, Appellant, v. STATE CORPORATION COMMISSION OF KANSAS, HARRY SNYDER, JR., Chairman, RICHARD C. BYRD and JOHN I. YOUNG, as Members of said Commission, and their respective successors in Office, Appellees.

No. 40,403

THE CITY OF BELOIT, KANSAS, AND 145 OTHER KANSAS CITIES (Anthony, Atchison, Augusta, Axtell, Baldwin, Barnard, Baxter Springs, Belle Plaine, Belleville, Blue Rapids, Bogue, Buffalo, Buhler, Burns, Burr Oak, Cedar Vale, Chapman, Cherryvale, Chetopa, Clay Center, Clifton, Coffeyville, Colwich, Conway Springs, Council Grove, Countryside, Dearing, Dighton, Downs, Edgerton, Elgin, Ellinwood, Ellis, Emporia, Ensign, Esbon, Formoso, Fort Scott, Fowler, Frankfort, Galena, Garfield, Garnett, Gem, Chuda Springs, Girard, Glasco, Goodland, Great Bend, Greensburg, Gypsum, Haddam, Halstead, Hanover, Hays, Herington, Hill City, Hillsboro, Holton, Horton, Huron, Independence, Iola, Jetmore, Junction City, Kanapolis, Kensington, Kingman, Laharpe, Lawrence, Leavenworth, Lebanon, Lenexa, LeRoy, Lincoln Center, Linsborg, Little River, Longton, Luray, Lyndon, McPherson, Macksville, Madison, Mahaska, Mankato, Marysville, Meriden, Miltonvale, Minneapolis, Morrill, Mulvane, Munden, Merriam, Narka, Natoma, Neodesha, Ness City, Newton, Norcatur, Norton, Oakley, Osawatomie, Osage City, Plainville, Pomona, Prairie Village,

Pratt, Preston, Quenemo, Ramona, Rantoul, Reserve, Roeland Park, St. Francis, St. Marys, Scammon, Scott City, Sedan, Sedgwick, Seneca, Shawnee, Silver Lake, Sterling, Stockton, Sylvan Grove, Thayer, Topeka, Toronto, Turon, Wa-Keeney, Wamego, Washington, Waterville, Waverly, Weir, Wellington, Westmoreland, Whitewater, Whiting, Williamsburg, Wilson, *Appellants*, v. STATE CORPORATION COMMISSION, et al., *Appellees*.

SYLLABUS BY THE COURT

1. In Kansas, under legislation relating to the production and conservation of natural gas to prohibit waste (G. S. 1949, 55-701 to 55-713, incl.), the production and distribution of natural gas for light, fuel and power is a business of a public nature, the control of which belongs to the state, and under such sections of the statute the power to prevent waste and conserve natural gas is vested in the State Corporation Commission.

2. The provisions of the statute mentioned in the first paragraph of this syllabus give the State Corporation Commission power and authority to make an order fixing a minimum wellhead price for natural gas taken from a common source of supply, as a condition precedent for withdrawal of the gas from such common source of supply, when—as here—the evidence before the Commission warrants its conclusion such an order is necessary in order to prevent waste and to secure the relative rights of owners of real property from which such gas is produced from the common source of supply (Following *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704.).

3. A conservation order of the State Corporation Commission, similar to the order referred to in paragraph two of the syllabus, construed as meaning that from and

after the effective date of such order no person, firm or corporation—first of all the producer—can lift or take gas in its natural state from the depths of the Hugoton Gas Field in Kansas to a point further than the wellhead without, as a condition precedent to its withdrawal, first attributing thereto the minimum price prescribed by the terms of such order.

4. In the light of the facts of record and with the order construed as set forth in paragraph three of the syllabus it is held that such order falls squarely within the excluding provisions of the Natural Gas Act (15 U. S. C. A. § 717 [b]) providing that the terms of such act do not apply to the production of natural gas.

5. The record further examined, and it is *held*, that under the facts, conditions and circumstances set forth at length in the opinion, the trial court did not err in its judgment upholding and sustaining the order of the Commission as a lawful and reasonable order.

Appeals from Finney district court; ROLAND H. TATE, judge. Opinion filed December 8, 1956. Affirmed.

Mark H. Adams, of Wichita, and *Joe Rolston*, of Oklahoma City, Oklahoma, argued the cause, and *M. F. Cosgrove*, of Topeka, *D. B. Lang*, of Scott City, *Conrad C. Mount*, *O. R. Stites* and *Gordon J. Quilter*, all of Oklahoma City, Oklahoma, were with them on the briefs for the appellant Cities Service Gas Company.

Ralph W. Oman, of Topeka, argued the cause, and *Robert L. Webb*, *Philip E. Buzick*, *Robert A. McClure*, and *James D. Waugh*, all of Topeka, were with him on the briefs for the appellant Cities.

C. C. Linley, general counsel, State Corporation Commission, of Topeka, and *Dale M. Stucky*, special counsel,

of Wichita, argued the cause, and *Charles R. Escola*, assistant general counsel, of Topeka, *Howard T. Fleeson* and *Wayne Coulson, of counsel*, both of Wichita, and *Don C. Smith, special counsel*, of Dodge City, were with them on the briefs for the appellees.

The opinion of the court was delivered by

PARKER, J.: The present appeals, consolidated for purposes of review in this court, challenge the validity of an order of the State Corporation Commission (hereinafter referred to as the Commission) subsequently upheld in a review proceeding by the district court of Finney County, fixing a minimum price of eleven cents per thousand cubic feet, 14.65 pounds p. s. i. a., at the wellhead for all persons, firms or corporations taking gas or causing gas to be taken from the Hugoton Gas Field in Kansas on or after January 1, 1954.

The salient facts essential to a proper understanding of the issues involved will be related as briefly as the state of a lengthy record permits.

On August 18, 1952, the Southwest Kansas Royalty Owners Association, a corporation, and other individuals, commenced the proceedings by filing with the Commission a petition, alleging in substance that a previous minimum gas price order made by that body was no longer adequate to conserve and prevent waste of natural gas and protect correlative rights in its common source of supply in the Hugoton Field and requesting that, pursuant to authority conferred upon it by the provisions of G. S. 1949, 55-701 to 55-713, incl., the Commission set a minimum price, for such gas in such field, of not less than fourteen cents per M. c. f. measured on a pressure basis

of 16.4 pounds per square inch or not less than twelve cents per M. c. f. measured on a pressure basis of 14.65 pounds per square inch.

Shortly after the commencement of the proceedings the appellants herein intervened and filed written protests. In its protest the Cities Service Gas Company (hereinafter referred to as the Gas Company) alleged that it was a foreign corporation, a natural gas company as defined in the Natural Gas Act as amended (15 U. S. C. A. §717), was engaged generally in the business of producing and purchasing natural gas for transportation and sale in interstate commerce for resale by means of an integrated pipeline system extending through several states and protested the granting of the relief sought by the petitioners on numerous grounds, the one here involved being that under the facts and circumstances currently existing in the Kansas-Hugoton Field, and operations of the protestant therein, the Commission had no jurisdiction or authority, either on application of petitioners or otherwise, to fix or determine either a minimum or other price for natural gas produced in and from such field. In their protest the appellants, the City of Beloit, Kansas, and the other Cities listed in the title of this opinion (hereinafter referred to as the Cities), alleged that they were interested parties because their inhabitants were purchasers, users and consumers of natural gas for divers domestic, household and industrial purposes and then, for purposes here in question, protested the granting of the relief sought by petitioners on grounds practically the same as those relied on by the Gas Company in its protest.

On December 2, 1953, effective January 1, 1954, the Commission, after hearings consuming approximately thirteen days, promulgated and issued a minimum value attribution and/or price order for the Kansas portion of

the Hugoton Gas Field. For present purposes it may be said that the all important portion of such order reads:

> "That all persons, firms or corporations which take gas or cause gas to be taken from the Hugoton Gas Field in Kansas on and after January 1, 1954, 12:01 A. M., shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease-owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per Mcf. (14.65 pounds p. s. i. a.) at the wellhead until further order or orders of this Commission."

By reference the Commission made a memorandum opinion a part of the foregoing order. This order is lengthy and in such form its averments cannot be readily summarized. However, it leaves no doubt and eliminates all confusion as to the purpose of the Commission in making the order and the grounds on which it based its action. For these reasons we attach a copy of such memorandum to this opinion as an appendix where it will be available for ready reference.

The Gas Company and the Cities each filed motions for rehearings. These were considered by the Commission and overruled. Thereupon such parties filed their separate actions for judicial review of the order of the Commission by the district court of Finney County, as authorized by G. S. 1949, 55-707, in the manner provided in G. S. 1949, 55-606. Ultimately these actions were consolidated for trial by such district court and heard together. What happened during the trial and the results thereof are best reflected in identical journal entries of judgment. With respect to such matters these journal entries, omitting three paragraphs thereof relating to mo-

tions to dismiss by the defendants the Commission and the three acting members thereof in their official capacity, not involved on appellate review, read:

"Now on this 26th day of April, 1956, this matter comes on duly for hearing and trial, the parties appearing by and through their respective counsel of record.

"Thereupon, in open court, the evidence is submitted to the court on the record of the proceedings had before the State Corporation Commission, on the abstracts, counter abstracts and supplements thereto, filed herein by the parties, including the exhibits introduced in such proceedings."

"Thereupon, the court proceeded to hear further arguments to their conclusion and, the cause being fully submitted, took the case under advisement.

"Now on this 14 day of May, 1956, the court having given due consideration to all the evidence in the cause as aforesaid, the briefs and oral arguments of counsel, and being otherwise fully advised in the premises, finds:

"1. That the Order entered by the State Corporation Commission of the State of Kansas, one of the defendants herein, in its Docket No. 44,079-C (C-3216), Conservation Division, on the 2nd day of December, 1953, on review herein, was a lawful and reasonable order.

"2. That said Order here before this court on a petition for review should be upheld and sustained.

"IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that said Order entered by the State Corporation Commission of the State of Kansas, one of defendants herein, in its Docket No.

44,079-C (C-3216), Conservation Division, on the 2nd day of December, 1953, be and the same is hereby upheld and sustained, and that the costs of review in this court be and they hereby are assessed against the plaintiff."

Following rendition of the foregoing judgment the plaintiffs in the two actions, i. e., the Gas Company and the Cities, filed separate motions for a new trial. When these motions were overruled such plaintiffs perfected separate appeals which, upon reaching this court, were consolidated for purposes of hearing and argument on motion of the appellant Cities.

From what has been stated up to this point it might seem that many issues are involved on this appeal. Not so. It can be conceded that numerous issues were raised by the protesting appellants before the Commission and in the trial of the issues presented by their respective petitions for judicial review in the court below. However, the fact is that under their specifications of error and questions stated and argued in their briefs, which we pause to note are substantially the same and may hereafter be treated as identical in nature, the sole question presented on appellate review is, that in the light of the facts and circumstances of record, the Commission had no jurisdiction to issue the minimum value attribution and/or price order in question because the sole and exclusive jurisdiction to make such order is vested in the Federal Power Commission under the Natural Gas Act (15 U. S. C. A. §717); and that all other issues raised below have been abandoned by appellants and are not here subject to review. Therefore we proceed on that basis, noting as we do so, that such question will be disposed of without regard to reference made by the Commission in its brief and on oral argument to an interpretation of the involved

order made subsequent to the date on which the rights of the parties were determined by the judgment rendered in the district court.

In approaching consideration of the foregoing question its disposition will be simplified by pointing out and directing attention to other facts and matters of record about which there can be little if any dispute. These, so far as appellants are concerned, may be stated thus.

During all dates in question the Gas Company, a natural gas company as defined in the Natural Gas Act, in its operations in the purchase of gas in the Kansas-Hugoton Field purchased gas from the producers delivered at the wellhead, also delivered at its pipeline in the field after production and gathering had ended. It had no production in the field and purchased therein all gas so obtained. Of the gas so purchased during the year 1951, 55.4 per cent was purchased at the wellhead and 44.5 per cent pipeline delivered in the field after production and gathering had been completed.

From what has been heretofore stated it appears that the sales of gas made by producers in the field to the Gas Company, in the first instance after production had ceased and in the second after production and gathering had ended, were sales in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or other uses. It also appears from such record that after such sales had been completed the Gas Company placed such gas in its interstate integrated pipeline system and thereafter made resales thereof to at least some of the appellant Cities.

We now turn to facts and matters, more important to the Commission's position the judgment should be upheld, about which there can be no more controversy than there is respecting those last above stated.

[APPENDIX]

In Kansas, under legislation enacted to control the production and conservation of natural gas and to prohibit waste (G. S. 1949, 55-701 to 55-713, incl.) the production and distribution of natural gas for light, fuel and power is a business of a public nature, the control of which belongs to the state. See *La Harpe* v. *Gas Co.*, 69 Kan. 97, 76 Pac. 448, and *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, infra, and under the sections of the statute above cited, the power to prevent waste and conserve natural gas is vested in the State Corporation Commission.

In *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704, rehearing denied in 170 Kan. 341, 225 P. 2d 1054, which has never been repudiated and is still the law of this state, this court held that the Corporation Commission had authority to make an order fixing the minimum wellhead price for natural gas taken from a common source of supply if the evidence before it justified its conclusion that such order was necessary in order to prevent waste and to secure the relative rights of owners of real property from which gas is produced from a common source of supply. And commencing with page 728 of the opinion rejected a contention similar to the position assumed by appellants here that since Cities Service is engaged in the business of transporting natural gas in interstate commerce it is governed wholly by the Federal Natural Gas Act and therefore the Commission had no jurisdiction to make an order similar to the one presently involved.

The Order issued by the Commission in the instant case is substantially the same as the one involved in the last above cited case (169 Kan. 722), the only difference being that the present order raises the minimum value attribution and price of gas at the wellhead for the Hugo-

ton Field, with some variation and pounds p. s. i. a., from eight cents to eleven cents per M. c. f. and expressly provides that all persons, firms or corporations which take gas or cause gas to be taken from such field shall pay or attribute such minimum value attribution or price *as a condition precedent for withdrawal from the common source of supply.* (Emphasis supplied.)

Finally it can be stated that, inasmuch as appellants have abandoned all questions involved in the court below except the jurisdictional one heretofore mentioned, we must and do assume, the evidence before the Commission was sufficient to sustain its findings to the effect the involved order, upheld and sustained by the trial court, was necessary and required in the interest of conservation and prevention of waste of gas in the Hugoton Field.

The parties are far apart in their construction of the Commission's order. On the one hand the appellants contend such order is a price-fixing order having application to sales of natural gas made by producers after its production and gathering has ended. On the other the Commission contends it is purely a conservation measure, limited to production of gas from the common source of supply before cessation of production, which makes the minimum attribution price therein prescribed a condition precedent to the withdrawal of any natural gas whatsoever from such source. We are not inclined to labor arguments made by the parties respecting the construction to be given the order. It suffices to say, that after a careful analysis thereof, we have no difficulty in construing its terms to mean that no person, firm or corporation—first of all the producer—can lift or take gas in its natural state from the depths of the Hugoton Field to a point further than the wellhead without, as a condition precedent to its withdrawal from the common source of supply, first attribut-

ing thereto a minimum price of not less than eleven cents per M. c. f. (14.65 pound p. s. i. a.). So construed, recognizing as we must that under our own decisions (*Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission, supra; La Harpe* v. *Gas Co., supra*) as well as those of the highest court of the land (see, e. g., *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364; *Interstate Gas Co.* v. *Power Comm'n*, 331 U. S. 682, 91 L. Ed. 1742, 67 S. Ct. 1482; *Cities Service Co.* v. *Peerless Co.*, 340 U. S. 179, 95 L. Ed. 190, 71 S. Ct. 215; *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, 95 L. Ed. 204, 71 S. Ct. 221) the Commission has power to regulate the physical production and gathering of natural gas in the interest of conservation, including the protection of correlative rights and the prevention of waste, the involved order falls squarely within the hereinafter emphasized excluding provisions of the Natural Gas Act (15 U. S. C. A. §717 [b]) which reads:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale *but shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution *or to the production or gathering of natural gas.*" (Emphasis supplied.)

Thus, based on our construction of the order and since the Federal Act, as heretofore quoted, expressly provides that its terms shall not apply to the production of natural gas, it appears the trial court did not err in concluding the Commission's order should be upheld and sustained.

On the basis of what has been heretofore related, and without repeating it, we believe there is another sound reason for upholding the two judgments now under consideration. It is based in part on the doctrine of *stare decisis*. In *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission, supra,* in the face of facts and circumstances so similar as to afford no sound ground for distinguishing that case and the one at bar from a factual standpoint, we held that the Commission had power, authority and jurisdiction to enter an order substantially the same as the one here involved in the interest of conservation of gas in the Hugoton Field. In our opinion that decision, which is still the law of this state, is a controlling precedent and adherence to what is there said and held requires an affirmance of the instant judgments.

It may be conceded, as appellants suggest, that by reason of Article VI of the Constitution of the United States this court is controlled by the interpretation placed upon a Federal statute (in this case the Natural Gas Act) by the decisions of the Supreme Court of the United States and that this is true regardless of views of state courts even though such decisions are in conflict with their prior decisions. Indeed no court has been more observant of this principle than our own. See e. g., *Amalgamated Meat Cutters, Etc.* v. *Johnson,* 178 Kan. 405, 412, 286 P. 2d 182 and *Kaw Paving Co.* v. *International Union of Operating Engineers,* 178 Kan. 467, 472, 290 P. 2d 110. So we come to the last question of importance.

In an attempt to avoid the force and effect of the conclusions, heretofore announced, appellants place great weight on three comparatively recent decisions of the Supreme Court of the United States, i. e., *Phillips Petroleum Company* v. *Wisconsin,* 347 U. S. 672, 98 L. Ed. 1035, 74 S. Ct. 794; *Natural Gas Co.* v. *Panoma Corp.* (decided together

with *Natural Gas Pipeline Co.* v. *Corporation Commission of Oklahoma et al.*, 349 U. S. 44, 99 L. Ed. 866, 75 S. Ct. 578. Their claim in this respect is that in such decisions the Supreme Court of the United States has placed an interpretation upon the Natural Gas Act (15 U. S. C. A. §717) contrary to our decision in *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission, supra*, and contrary to conclusions heretofore announced by us in this opinion. It suffices to say, that after analyzing them we are unable to concur in appellants' construction thereof and have reached the conclusion that the Per Curiam opinion in *Natural Gas Co.* v. *Panoma Corp., supra*, shows on its face that their construction of such decisions is unwarranted. So far as here pertinent the opinion in the case last cited reads:

> *"In these cases Oklahoma has attempted to fix a minimum price to be paid for natural gas, after its production and gathering has ended*, by a company which transports the gas for resale in interstate commerce. We held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, that such a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission. The *Phillips* case, therefore, controls this one." (Emphasis supplied.)

Here, as we have indicated, the Kansas Commission has fixed a minimum price to be paid for gas before cessation of production. This fact in itself is sufficient to distinguish the decisions on which appellants rely and warrants our conclusion they are not to be regarded as controlling precedents.

Finally appellants contend that the trial court in rendering its judgments determined the price order in question applied to the operations of the Gas Company. We do not agree. Resort to its judgment, heretofore

quoted, discloses that all it did was uphold and sustain the order of the Commission, aimed at curtailing production in the Hugoton Field and based expressly on the premise the Commission was not fixing a price for gas in the field but prescribing a minimum price for all gas at the wellhead as a condition precedent for withdrawals from the common source of supply in the interest of conservation.

One last point, not connected with the merits, requires our attention. The Commission has filed a voluminous counter abstract in two sections, claiming the amount paid for printing the entire counter abstract. Section I abstracts the evidence presented before the Commission at the hearing of the instant proceedings. Section II abstracts the evidence and proceedings before the Commission leading up to and resulting in our decision in *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission, supra.* The Gas Company has filed a motion claiming that due to the issue as limited in its abstract and brief the printing of this counter abstract was unnecessary, hence all costs incurred should be borne by the latter. Nothing would be gained by detailing the reasons responsible for our disposition of this motion. All that is required is to state our conclusion. It is that section I of the counter abstract was proper, while section II thereof was unwarranted. Therefore, since each section of the counter abstract is about the same size, we find that the Commission is entitled to make claim for only one-half of the amount expended for printing the counter abstract as costs of this proceeding.

The conclusions heretofore announced require that the judgments be affirmed.

It is so ordered.

SMITH, C. J., not participating.

[APPENDIX]

Memorandum Opinion.

BY THE COMMISSION:

Our position respecting the attribution of a minimum wellhead price for natural gas from a common reservoir is so patent that we do not propose here to elaborate extensively on the subject matter. In the Memorandum Opinion entered on February 23, 1949, in Docket No. 35,154-C (C-1868), we set out our views at length when Kansas was pioneering in adoption of a minimum wellhead price as a conservation measure for an important irreplaceable natural resource.

That the State has a right, in the interest of conservation, to fix a minimum wellhead price for natural gas in a common source of supply, if the evidence justifies the conclusion that such an order is necessary to prevent waste and protect correlative rights, is now settled law. (*Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704, and 170 Kan. 341, 225 P. 2d 1054; *Phillips Petroleum Company* v. *State of Oklahoma*, 340 U. S. 190, 71 S. Ct. 221, 95 L. Ed. 204. *Cities Service Gas Company* v. *Peerless Oil and Gas Co.*, 340 U. S. 179, 71 S. Ct. 215, 95 L. Ed. 190).

In the docket to which we have here referred, after protracted hearings we promulgated an interim order on February 18, 1949, establishing a minimum wellhead price of eight cents (8¢) per M. c. f. for gas in the Kansas portion of the Hugoton Gas Field. The eight-cent (8¢) figure prevails at this writing. In the Memorandum Opinion we said:

> "The evidence offered at the hearings in this proceeding is not sufficient to permit us to determine finally what a reasonable and fair minimum fixed price at the wellhead should be in the field."

By separate order on the same day we instituted our own investigation of prices being paid at the wellhead in the field.

By order of May 2, 1951, Docket 35,154-C (C-1868) and Docket C-164, the Commission closed that investigation assigning as reasons therefor in substance: that because of the long lapse of time resulting from litigation and the changes, meanwhile, in field conditions and development, and in marketing and conservation practices, much of the evidence at the hearing had become obsolete, lacked continuity and had become of questionable significance in determining a reasonable minimum price. We, however, said in that order:

> "if upon further consideration * * * it is deemed appropriate in the interest of conservation * * * to explore current factors and prevailing trends regarded as necessary in the determination of a minimum value other than 8 cents * * * the institution of a new investigation would be more feasible, beneficial and practical * * *."

The Commission never instituted a new investigation on its own motion, but it did use the instant docket for the purpose of making a very comprehensive and exhaustive study of the entire matter, allowing all persons having any possible interest in the matter, to present their evidence. Certain interests attempted to have the instant hearing limited to the period of time since March 1, 1949, the effective date of the Interim Order. The Commission, however, refused to so limit it and conducted the hearing as if the whole matter were being considered *ab initio*.

The history of these proceedings forcibly leads to the conclusion that we used in our Interim Order the very least possible minimum price then determinable and in-

timated that further study could well demonstrate that a higher minimum price was reasonable and necessary.

To disregard the preponderance of evidence before us now would in effect be finding that the eight-cent minimum price has accomplished in the prevention of waste all that any minimum price could accomplish and that no waste, physical, economic or other is now occurring in the field which any minimum price could prevent.

Before us is an application requesting a new minimum wellhead price for natural gas in the Kansas Hugoton Gas Field of fourteen cents (14¢) per M. c. f. on a pressure basis of 16.4 pounds p. s. i. a. or in the alternative not less than twelve cents (12¢) per M. c. f. measured on a pressure basis of 14.65 pounds p. s. i. a.

Prior to the filing of the application on August 18, 1952, we had been giving informal consideration and study as to whether or not the adopted minimum wellhead price of eight cents (8¢) per M. c. f. in the field was efficacious. We have reached the conclusion that it is not.

The vastness and importance of the Hugoton Gas Field to Kansas requires our every-day attention. It must be remembered that the field, approximately sixty-five per cent of which underlies nine southwestern Kansas counties, also extends into the states of Oklahoma and Texas. In February, 1948, the public records of this Commission disclose there were 985 wells in the Kansas portion of the field, whereas in November, 1953, there were 3,065, an increase of more than 300%, with more wells drilling. It is readily seen that there are ever-changing conditions in the field and conditions that exist now affecting conservation which were not conceivably involved in the hearings in 1948 relative to Docket No. 35,154-C (C-1868). With the greater number of wells in the field today, the

public interest becomes all the more pronounced in the conservation of this precious fuel. We therefore are aware at all times of the realistic circumstances through which gas is withdrawn from the producing horizons of that field.

In this docket we have held extensive public hearings consuming twelve days and one night session. The transcript of these proceedings covers 2,284 pages and 70 exhibits were offered. The applicants produced an abundance of testimony as did certain of the protestants which included pipeline companies and representatives of gas consumers in the state. We have painstakingly reviewed the transcript of all the testimony and have arrived at the conclusion that the preponderance of evidence is that the prevailing minimum wellhead price in the Hugoton Gas Field is obsolete and that we should adopt a new wellhead price in the interest of protecting the public from dissipation of this irreplaceable natural resource, to carry out our statutory duties in the avoidance of waste and to protect correlative rights.

In this Memorandum Opinion, as we indicated, we do not intend to write a dissertation on the subject of minimum wellhead prices as conditions precedent for withdrawing gas from a common source of supply, but there are a few inescapable deductions that cannot be refuted which we wish to observe in passing.

The first deduction remains today, as was pointed out in our Memorandum Opinion of February 23, 1949, that gas is not truly competitive with the two other main fuels, namely, coal and oil. The cheapest and most efficient of the three fuels, gas is more convenient in more uses to the consumer than are the others. This is all borne out by the record. Gas is a commodity. Cheapness of commodity is an avenue to ultimate waste. It is common

knowledge that the records of every pipeline company and distributing company are replete with astonishing numbers of conversions from other fuels to natural gas where it is available.

Thus if the minimum wellhead price of natural gas is permitted to remain too low, effectiveness in achieving its objective as a conservation measure is thwarted.

Second, it cannot be factually disputed that the Kansas portion of the Hugoton Gas Field is in closer proximity to the market in the North, East and West; namely, Kansas, Colorado, Wyoming, Nebraska, South Dakota, Minnesota, Iowa, Missouri, Illinois, Indiana, Pennsylvania, Ohio and Michigan, than those portions lying in the other states which comprise the Hugoton Gas Field in its entirety. The essence of that fact is that the cost of the transportation of gas to these markets from Kansas is less than from either Oklahoma or Texas. If the minimum wellhead price of gas is lower, less the differential in transportation and other items, there exists clearly a violation of correlative rights and the resultant discrimination is conductive to waste for apparent reasons. Anyone familiar with the Hugoton Gas Field knows that situation prevails today. If such a situation continues to exist, it is obvious as a matter of economics that it will lead to earlier depletion of the Kansas wells, thus violating correlative rights and making disproportionate withdrawals possible.

Gas nearer the markets should command a higher price. Northern Natural Gas Company, a protestant here and a large taker from the field, is now paying a much higher price for its Permian Basin (Texas and New Mexico) gas delivered to Skellytown, Texas; yet its markets are in Minnesota, Iowa, South Dakota, Nebraska and Kansas. (Less than 4% in Kansas).

There is another observation that we wish to make. Certain of the protestants here have been under the impression that this was a rate case. That assumption is erroneous. Therefore, the testimony on behalf of these protestants is not germane to the issue of conservation. We conducted these proceedings as the gas conservation agency of the state under G. S. 1949, Chapter 55, Article 7, and not as the public regulatory body as provided by G. S. 1949, Chapter 66. Only one of the distributing companies in the state and three others which are both pipeline companies and distributing companies, participated in these proceedings. It is significant that neither of the two largest gas distributing companies in Kansas and others assumed that this was a rate case.

It is true that this Commission, as a public regulatory body, has rate-making authority within the state of Kansas, but does not possess nor seek to possess jurisdiction over rates for the sale of natural gas in interstate commerce. The theory pointing to the arguments in the record respecting rates must be dispelled. In adopting a minimum wellhead price for the Hugoton Gas Field in Kansas, we look exclusively to the interest of the public in conservation.

All the factors which supported the eight-cent (8¢) minimum price in 1949 will, in the light of further consideration support a higher minimum now.

Some inequities were corrected by the Interim Order, but others still exist. Some purchasing companies, after the minimum eight-cent order voluntarily adjusted their prices, even on old contracts, somewhat above eight cents. Others did not. That eight cents is not now a reasonable minimum price is evidenced by the fact that practically all new contracts have been made at higher prices and many old contracts changed to more than eight cents.

Since the minimum eight-cent order in 1949, there has been a marked increase in the cost of development, an increase in the number of wells in the field, a change in the amount and nature of the demand for gas with an exceptionally great increase in the demand for space heating; additional pipelines have been built and new markets added.

It is an accepted fact that increase in storage fields has made pipeline companies less dependent on industrial loads to maintain good load factors; consequently there is less reason for extremely low prices to industries. As an illustration of this factor, Cities Service Gas Company, currently the largest taker from the field, has developed underground storage facilities extensively in Kansas. A recent development is the Colony Gas Field in Anderson County, Docket No. 44,080-C (C-3217). One of its large distributing companies, Union Gas System, Inc., has pioneered in underground reservoirs in southeastern Kansas, and now employs such facilities to augment its normal pipeline withdrawals. Other pipeline takers have underground storage space beyond the borders of the state or are in the process of acquiring such facilities.

And too, increase in source cost (price) of gas has not kept pace with increase in source prices of other fuels because owners of land and producers of gas have no freedom of contract.

The field has now developed to the extent that there is not enough undedicated acreage to warrant any new pipelines and no reason to expect any advance in price by reason of competition.

The evidence disclosed that wellhead prices of gas have been increased in Ohio, Texas, New Mexico, West Virginia, Oklahoma, the Gulf Coast area, and practically

all producing states and in relatively unimportant small fields.

As has been noted, we adhere to our conclusions in the Memorandum Opinion of February 23, 1949, in all respects except it is our position after study and research that today, under the prevailing conditions, the eight-cent (8¢) per M. c. f. minimum price adopted in 1949 is neither fair nor reasonable.

Finally, it is now fundamental and accepted that price is a dominant medium to conservation. We are not here fixing a price for gas in the field, a maximum price, a fair field price or a going price, but we are prescribing a minimum price for all gas, except for lease usage, of eleven cents (11¢) at the wellhead on a pressure base of 14.65 pounds p. s. i. a. *as a condition precedent for withdrawals from the common source of supply, in the interest of conservation.*

An appropriate order in conformance with the views heretofore expressed will be entered in this docket as of this day.

APPENDIX "B."

Order

Now on this 2nd day of December, 1953, the above-entitled matter comes before the Commission for further consideration and final disposition. The Commission, having examined the petition files and record, and being fully advised in the premises, finds:

1. That the petition herein was filed by the Southwest Kansas Royalty Owners Association, a non-profit corporation, and certain individuals who are the owners

of minerals in place or royalty interests in the Hugoton Gas Field, and that it is a petition for a new minimum wellhead price in said field of 14 cents per M. c. f. on a pressure basis of 16.4 pounds per square inch or in the alternative not less than 12 cents per M. c. f. measured on a pressure basis of 14.65 pounds per square inch.

2. That after due notice a public hearing was scheduled at the Allis Hotel, Wichita, Kansas, on September 26, 1952, at which time on motion of certain intervenors the matter was continued to October 20, 1952, in Topeka, and that hearings were held thereon at Topeka on October 20, 21, 22 and 23, 1952, December 15, 16, 17, 18 and 19, 1952, and January 14, 15 and 16, 1953.

3. That appearances were entered on behalf of the following: Southwest Kansas Royalty Owners Association and certain individual petitioners by Howard T. Fleeson, Dale M. Stucky, both of Wichita, and A. E. Kramer, Hugoton, their attorneys; Northern Natural Gas Company by its attorneys Lawrence I. Shaw, Omaha, Nebraska, and Mark Adams, Wichita; Panhandle Eastern Pipe Line Company by its attorneys Edward H. Lange, Kansas City, Missouri, Louis R. Gates, Kansas City, Kansas, and Mark Adams, Wichita; Cities Service Gas Company by its attorneys O. R. Stites, Sr., and Joe Rolston, both of Oklahoma City, Oklahoma, Mark Adams, Wichita, and O. R. Stites, Jr., of Topeka; Kansas-Nebraska Natural Gas Company by its attorneys James Conway, Hastings, Nebraska, and M. F. Cosgrove, Topeka; Kansas-Colorado Utilities by its attorney Harold Bolton, Abilene. Other appearances include: Consumers Cooperative Association, et al. by their attorney Phillip Dergeance, Lawrence; Lehigh Portland Cement Company by its attorney Frederick G. Apt, of Iola, and R. F. Jones; Coleman Company of Wichita by A. A. Knapp; the Office of Price Stabilization by its at-

torney Frank Theis of Arkansas City; the Eastern Kansas Gas Company of Iola, by J. H. Page and John McNally, both of Iola; Kansas Association of Municipal Utilities by its attorney Charles W. Lower, Kansas City, Kansas. That the following attorneys appeared on behalf of cities of Kansas as their respective city attorneys: James W. Wallace, Scott City; C. J. Brenneisen, Kansas City, Kansas; O. C. Jordan, Beloit; Casey Jones, Hill City; Corwin Spencer, Oakley; H. D. Oelschlaeger, Plainville; Max Jones, Goodland; Sam W. G. Lowe, Colby; F. A. Sloan, Hoxie; Charles Stough, Lawrence and Fred W. Aley, Wichita; that James A. McClure, Robert L. Webb, Ralph W. Oman, all of Topeka, and Jerome M. Joffee of Kansas City, Missouri, (since deceased) appeared, representing a group of protesting cities. Jay Kyle, General Counsel and R. C. Woodward, Special Counsel, appeared for the Commission and the public generally. That the Commission has jurisdiction of the subject matter and of the parties.

4. That since the public hearings referred to in Finding No. 2, the Commission entered an order on May 20, 1953, in its Docket No. 34,780-C (C-1825) changing the definition of "Gas, Cubic Foot," as defined by Commission Rule 82-2-201 adopted December 24, 1947, and on file with the Revisor of Statutes pursuant to Laws 1947, Chapter 440. That said order made specific findings relating to the obsolescence of its former rule relating to "Gas, Cubic Foot," which was statewide in its application, and as a result thereof adopted a new definition of "Gas, Cubic Foot," pursuant to its statutory authority (G. S. 1949, Chapter 55, Article 7, as amended). That said definition applies to each and every gas field in the State of Kansas except those wells specifically prohibited from regulation by the proviso in G. S. 1949, 55-703, and applies to all

withdrawals of gas in the State of Kansas since July 1, 1953, 12:01 a. m.; said rule as amended is currently on file with the Revisor of Statutes in accordance with G. S. 1949, 77-405 et seq.

5. That in Docket No. 35,154-C (C-1868) on February 18, 1949, the Commission promulgated an Interim Order, in which findings included *inter alia* that in the interest of conservation the fair and reasonable minimum price of natural gas at the wellhead in the Hugoton Field should be eight cents (8¢) per M. c. f., and that all takers of gas from said field would attribute thereto for purposes of payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of eight cents (8¢) per M. c. f. at the wellhead until further order of the Commission in the investigation instituted by it in Docket No. C-164.

6. That subsequent to the Interim Order dated February 18, 1949, Kansas-Nebraska Natural Gas Company and Northern Natural Gas Company filed applications for judicial reviews thereof in the District Court of Finney County, Kansas, under the provisions of the Laws of 1945, Chapter 233, Section 9; that likewise, under the same authority, Panhandle Eastern Pipe Line Company brought a similar action in the District Court of Seward County, Kansas; and that Cities Service Gas Company filed a complaint against the Commission in the United States District Court for the District of Kansas, which subsequently was dismissed by that company. The three cases in the state courts were consolidated for hearing before the District Court of Finney County sitting both in the capacity of Judge of Finney County District Court and Judge pro tem of Seward County District Court. From adverse decisions in the district courts all three takers of gas (Kansas-Nebraska, Northern and Panhandle)

took appeals to the Supreme Court of Kansas, which upheld the district courts and sustained the Commission's authority to establish the minimum wellhead price of eight cents (8¢) per M. c. f., (*Kansas-Nebraska Natural Gas Co.* v. *State Corporation Com.*, 169 Kan. 722). The three appellants subsequently filed motions for rehearing which were denied by the Supreme Court, (*Kansas-Nebraska Natural Gas Co.* v. *State Corporation Com.*, 170 Kan. 341). Following the two Supreme Court decisions just referred to, the Commission in the original docket by appropriate order dated February 21, 1951, promulgated an implementing order to its Interim Order and later entered an Order Nunc Pro Tunc on March 8, 1951, in said docket, to correct an error in its order of February 21, 1951. The Commission, at the time it entered its Interim Order February 19, 1949, wrote a Memorandum Opinion under date of February 23, 1949, which related some of the history of the field, the powers of the Commission and generally the Commission's jurisdiction over the conservation of this irreplaceable natural resource and the production of gas in the Hugoton Field of Kansas. It would be unnecessarily repetitious to set out here the contents of that Memorandum Opinion.

7. That the proceeding in this docket is not a rate matter.

8. The Commission as of this date has entered in this docket a Memorandum Opinion which should be incorporated herein and made a part of this order by reference.

9. That because of the voluminous record and the widespread interest in the subject matter, not only in the interest of conservation and protection of correlative rights but also because of the possible effect the decision herein

may have on certain classes of rates to consumers, we have felt impelled to re-examine the question of a reasonable minimum wellhead price structure in the Kansas Hugoton Gas Field which is now furnishing gas to more than one-fourth of the states of the Union.

10. It is not disclosed by the record before us that the eight-cent (8¢) price adopted by the Commission through its Interim Order of February 18, 1949, and now in effect, has had any adverse effect upon marketing or marketing conditions in the field or that it has adversely affected ultimate domestic consumer rates, Promulgation of a minimum price is a paramount factor in conservation and the protection of correlative rights. Having a low value in the stages of production, gas can be used uneconomically and wastefully because of the low commercial price being paid at the wellhead. That an important source of gas for the economy of not only Kansas but many other states is the Kansas portion of the Hugoton Gas Field; that gas is not now competitive with other fuels, namely, oil and coal; that the cheapness of gas is conducive to waste as prohibited by statute.

11. That conditions exist which, coupled with known differentials in transportation costs, adversely affect correlative rights.

12. Public records of this Commission clearly indicate that since February, 1948, the number of wells in the field has more than tripled, and that ultimate development of the field is rapidly approaching. All of this leads to the inevitable conclusion that withdrawals from the field are nearing their peak, and also carries the warning that practices of conservation must be heightened if the public is to enjoy the fullest recovery of gas from the Hugoton Field.

13. A true stimulant to conservation is price, and a low price is conducive to waste which is specifically prohibited by G. S. 1949, 55-701. Experience in the Hugoton Field since 1949, the year of the first minimum wellhead order, has shown that a floor price in the interest of conservation supports the concept of conservation by economic uses and the avoidance of waste. It is apparent this can be best accomplished through a realistic minimum field price for this precious fuel.

14. Since price is a prime factor in avoiding various types of waste, strengthening that factor strengthens conservation in the Hugoton Field.

15. The minimum price of eight cents (8¢) per M. c. f. at the wellhead adopted by the Interim Order of February 18, 1949, is not now an effective conservation measure for the various reasons amplified in the Memorandum Opinion.

16. That a fair and reasonable minimum wellhead price to be attributed to all gas taken from the field, except gas used for lease operations is in the public interest and welfare, encourages conservation, furthers the avoidance of discrimination and helps to promote orderly development and exploration.

17. That currently a fair and reasonable minimum price for gas at the wellhead in the Hugoton Field is eleven cents (11¢) per M. c. f. (14.65 pounds p. s. i. a.).

18. That all persons, firms or corporations which take gas or cause gas to be taken from the Kansas Hugoton Gas Field on and after January 1, 1954, 12:01 a. m., should be required, as a condition precedent for withdrawal from the common source of supply, to pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease

owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per M. c. f. (14.65 pounds p. s. i. a.) at the wellhead.

19. That the petition herein should not be granted on either basis requested.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That the Memorandum Opinion entered herein this date be, and the same is, hereby incorporated and made a part of this order by reference.

IT IS FURTHER BY THE COMMISSION ORDERED: That the petition herein be, and the same is, hereby denied.

IT IS FURTHER BY THE COMMISSION ORDERED: That all persons, firms or corporations which take gas or cause gas to be taken from the Hugoton Gas Field in Kansas on and after January 1, 1954, 12:01 a. m., shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per M. c. f. (14.65 pounds p. s. i. a.) at the wellhead until further order or orders of this Commission.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders, and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

APPENDIX "C."

Section 55-706 of Article 7, Chapter 55, G. S. Kan., 1949.

Proceedings upon petition. Proceedings may be instituted before the commission upon petition of any interested party, or by the attorney general on behalf of the state, or on the motion of the commission, upon any question relating to the enforcement of this act or the promulgation, revocation, amendment, renewal, interpretation, extension, or the enforcement of any rule, regulation or order, or the determination of any right thereunder, in the manner provided in section 55-605 of the General Statutes of Kansas of 1935, as amended, and that each and all of the provisions of said section as amended, shall apply to and govern such proceedings under this act. [L. 1935, ch. 213, Sec. 6; L. 1945, ch. 233, Sec. 8; March 24.]

APPENDIX "D."

Proceedings Before State Corporation Commission in Docket No. 52,417-C

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the matter of the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association relating to the enforcement and interpretation of the act relating to the production and conservation of natural gas and the order of December 2, 1953, issued pursuant thereto, in Docket No. 44,079-C (C-3216), Conservation Division, and complaining of violations thereof by Magnolia Petroleum Company and Cities Service Gas Company.

Filed 8th day of June, 1956, Docket No. 52417-C (C-5040) State Corporation Commission State of Kansas By Raymond B. Harvey Secretary

Petition and Complaint

Come now the Southwest Kansas Royalty Owners Association and J. F. Austin, Complainants and Petitioners, and represent and show to the Commission as follows:

1. On December 2, 1953, the Commission entered its order in its Docket No. 44,079-C (C-3216), Conservation Division, which order is incorporated herein by this reference there and made a part hereof. Said order provides, in part, as follows:

> "IT IS FURTHER BY THE COMMISSION ORDERED: That all persons, firms or corporations which take gas or

cause gas to be taken from the Hugoton Gas Field in Kansas on and after January 1, 1954, 12:01 A. m., shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per M. c. f. (14.65 pounds p. s. i. a.) at the wellhead until further order or orders of this Commission."

Said order is now and has been at all times relevant in full force and effect and has not been modified or amended in any way.

2. J. F. Austin, referred to as "Austin," is now and has been at all times relevant, a resident of Terrell Hills, Bexar County, Texas, and, as is hereinafter more fully set forth, is a landowner within the meaning of said order.

3. The Southwest Kansas Royalty Owners Association, referred to as the "Association," is now and has been at all times relevant, a non-profit membership corporation organized and existing under and by virtue of the laws of the State of Kansas, all of whose members are owners of mineral or lessor's royalty interests in the Hugoton Gas Field of Kansas and are landowners and royalty owners within the meaning of said order.

4. Magnolia Petroleum Company, referred to as "Magnolia," is now and has been at all times relevant, a corporation organized and existing under and by virtue of the laws of the State of Texas and duly authorized and empowered to transact business within the State of Kansas as a foreign corporation, with its general offices and post office address, Magnolia Building, Dallas, Texas. Magnolia takes gas or causes gas to be taken from the Hugoton Gas Field in Kansas and withdraws natural gas from the pro-

ducing structures constituting such common source of supply and is a producer of gas and lease owner, all within the meaning of said order, as is hereinafter alleged with greater particularity.

5. Cities Service Gas Company, referred to as "Cities Service," is now and has been at all times material, a corporation organized and existing under and by virtue of the laws of the State of Delaware and duly authorized and empowered to transact business within the State of Kansas as a foreign corporation, with its general offices and post office address, First National Building, Oklahoma City, Oklahoma; also maintaining an operating office in the Insurance Building, 212 North Market Street, Wichita, Kansas. Cities Service takes gas or causes gas to be taken from the Hugoton Gas Field and is a purchaser of gas within the meaning of said order, as is hereinafter alleged with greater particularity.

6. The subject matter of this petition and complaint is one of common or general interest to many and numerous persons described herein. It is impractical to bring them all before the Commission. For this reason and in order to prevent a multiplicity of complaints, these petitioners and complainants bring this petition and complaint in and for their own benefit and in behalf of and for the benefit of all landowners and royalty owners so identically or similarly situated, as well as in their capacity as members of the general public interested in the enforcement of the Statutes of Kansas relating to the Production and Conservation of Natural Gas, G. S. 55-701 *et seq.*, and of the lawful rules, regulations and orders issued by this Commission thereunder.

7. Magnolia has been at all times relevant the owner and operator of gas leasehold estates covering approxi-

mately 100,136 acres of land located within the Kansas Hugoton Gas Field. Petitioners and complainants are unable to state the exact number of royalty owners and landowners entitled to gas royalty payments reserved in said leases, but allege that they number more than 500, many of whom belong to the "Association." Austin is one of such persons, as the owner of an undivided one-thirty second interest in and to all of the oil, gas and other minerals in and under the following described land situated in Grant County, Kansas, to-wit:

> The Northeast Quarter of Section 4, Township 27 South, Range 35 West, containing 160 acres more or less.

By reason thereof, the approximately 500 persons above mentioned are landowners or royalty owners within the meaning of said order.

8. Magnolia, as the owner and operator of said leases, has caused to be drilled and completed on said 100,136 acres approximately 155 wells producing gas only, including the G. E. Dew No. 1 well, located on a consolidated gas leasehold estate containing the land belonging to Austin, above-described. Magnolia has at all times material taken raw natural gas through said well bores, from the porous limestone and dolomite underground structures constituting the Kansas Hugoton Gas Field and has withdrawn natural gas from such producing structures constituting such underground common source of supply through such wells, and has been and is a producer and lease owner.

9. Magnolia has produced and sold the following quantities of raw natural gas from said wells: (Figures show M. c. f. of gas, 14.65 p. s. i. a.)

Month	All Wells	G. E. Dew No. 1 Well
December, 1955	2,151,910	14,705
January, 1956	2,267,948	15,069
February, 1956	2,069,252	11,766
March, 1956	1,837,216	4,132
Totals	8,326,326	45,672

10. All of said gas has been and is being sold, after completion of production, by Magnolia to Cities Service under a gas purchase contract entered into between Magnolia and Cities Service on or about June 17, 1946. Cities Service has, after said sale, and pursuant to said contract, taken said gas into its possession for distribution and resale elsewhere, and by reason thereof takes gas or causes gas to be taken from said field, and is a purchaser of gas, all within the meaning of said order.

11. By virtue of the provisions of said leases, all of such landowners are entitled a landowner's one-eighth royalty and Austin is specifically entitled to landowner's royalty based on a full 1/32nd of 1/4th of 1/8th of all the gas produced from said G. E. Dew No. 1 well.

12. Effective January 1, 1954, Magnolia, pursuant to said order, began paying royalty to its said landowners and royalty owners based on price or attribution of value at the wellhead of eleven cents per M. c. f. for all such gas. Such payments continued for all gas produced until December 1, 1955. On or about January 3, 1956, Magnolia sent a letter to all of its royalty and mineral owners under its said wells, copy of which is attached hereto as Exhibit "A" and made a part hereof. All of its gas royalty payments for production since December 1, 1955, have been computed on the basis of only 5.229 cents per M. c. f. (14.65 p. s. i. a.).

13. Magnolia has tendered to its landowners and royalty owners the total approximate amount of only $54,422.75 as the one-eighth landowner's royalty due by reason of said production during said four months, and has tendered to Austin the sum of only $2.29 by reason of such production for said well, which payments Austin and other owners have refused to accept.

14. Under said order Magnolia was required to pay royalties based on the minimum price of eleven cents per M. c. f. for gas at the wellhead, or a total sum of approximately $114,486.98 to all of said landowners and royalty owners by reason of production from all of such wells, and was required to pay to Austin the sum of $4.96 by reason of such production from said single well.

15. By reason of such failure to pay, required by said order, Magnolia is indebted to said 500 landowners and royalty owners in the approximate total amount of $114,686.98 and is indebted to Austin in the amount of $4.96, together, in each instance, with interest from the time payments should have been made pursuant to the terms of each lease.

16. By reason of such failure to pay or attribute pursuant to said order, both Magnolia and Cities Service have been since December 1, 1955, and are now, violating said order and are in contempt thereof and of the Commission. They have wholly failed, neglected and refused to make payments as required thereunder or to attribute the minimum value required therein.

17. Magnolia and Cities Service, by reason of said order, are jointly and severally liable to all of the royalty owners and mineral owners under said leases for the difference between the amounts heretofore payed during said four months based on a price of only 5.229 cents per M. c. f.

and the amounts that are due and owing under said order, based on an attribution of value of eleven cents per M. c. f. at the wellhead.

18. Production under the circumstances herein set forth constitutes waste within the meaning of said order and the laws of Kansas. Both Magnolia and Cities Service will continue to violate and disregard said order unless the Commission enters an order or orders as prayed for herein.

Wherefore, petitioners and complainants pray as follows:

1. For an order directed to Magnolia and Cities Service, and each of them, requiring them to pay to Austin and all of the other landowners and royalty owners, with respect said leases, royalty based on 11 cents per M. c. f. (14.65 p. s. i. a.) retroactive to December 1, 1955, and that said takers of gas account to the Commission and report such payments as a condition precedent to the further taking of gas or the further causing of gas to be taken from said field and as a condition precedent to further withdrawals from said common source of supply, and in the absence of such retroactive payments and accounting and report, that the Commission, by appropriate order, prevent any further taking or withdrawal by said two companies, or either of them.

2. For an order directed to Magnolia and Cities Service, and each of them, requiring like payments in the future to all such landowners and royalty owners, as a condition precedent to further taking or withdrawal.

3. That this matter be set down for hearing, after due notice, to permit petitioners and complainants to prove the allegations hereof and to permit Magnolia and Cities Service to show cause why the relief prayed for herein should not be granted.

4. For such other and further relief to which petitioners and complainants may be entitled, and for such further orders as may be necessary for the implementation, interpretation and enforcement of said order dated December 2, 1953.

EXHIBIT "A"

MAGNOLIA PETROLEUM COMPANY

A Socony-Vacuum Company
Natural Gas Department
P. O. Box 900
Dallas 21, Texas
January 3, 1956

Re: Kansas Hugoton Gas Field Minimum Price Order, Docket No. 44079-C (C 3216); Cities Service Gas Company v. Magnolia Petroleum Company, No. Civil Action W-1095, United States District Court for the District of Kansas at Wichita.

Dear Royalty Owner: Cities Service Gas Company filed suit against Magnolia Petroleum Company in the above case seeking to have declared invalid the minimum price order above referred to. At the same time Cities Service Gas Company sued Magnolia Petroleum Company for the difference between 11 cents per M. c. f. at 14.65 pressure base and 6 cents per M. c. f. at 16.4 pressure base covering all payments made since January 1, 1954.

Cities Service Gas Company has failed to pay Magnolia for any gas delivered to it since July 23, 1955. Magnolia has continued to make payments to you based upon 11 cents per M. c. f. at 14.65 pressure base up to and including the payments made to you in December, 1955.

Cities Service Gas Company has tendered into the Federal District Court at Wichita, Kansas, the money due since

their last payment to us. Magnolia Petroleum Company has filed a motion to withdraw the amount due calculated at 6 cents per M. c. f. at 16.4 pressure base. This motion has been set for hearing for January 10, 1956. We anticipate that such a motion will be granted and that we may pay you upon your prorata portion of the gas delivered from your lease at the rate of 6 cents per M. c. f. on a pressure base of 16.4. This will result in a reduction in your royalty at the present time. This suit will be defended vigorously to recover the difference between 6 cents per M. c. f. at 16.4 pressure base and 11 cents per M. c. f. at 14.56 pressure base. In the event such an additional amount is recovered payments will immediately be made to you based upon the additional amount which may be due you.

We regret to inform you of this occurrence and trust that you fully understand our position in the matter. The Kansas Corporation Commission which issued the minimum order has sought to intervene in the above suit pend-

(January 3, 1956—Page 2)

ing in the Federal District Court. We can assure you that the minimum price order above referred to will be defended in every respect. If any additional information is desired, please do not hesitate to call upon us. You, of course, are vitally interested in the outcome of this suit. In the event that Cities Service Gas Company should recover in this suit you would have been overpaid from January 1, 1954 through December, 1955 as explained in our letter to you of February 1, 1954.

Yours very truly,

MAGNOLIA PETROLEUM COMPANY

By R. D. HANLEY, *Vice President.*

RDH:RM:gw

Order to Show Cause

Now, on this 13th day of June, 1956, the above-entitled matter comes before the Commission on its own motion and the Commission having examined the "petition and complaint" herein finds:

1. That the complaint herein was filed June 8, 1956; that it relates to alleged violations by Magnolia Petroleum Company and Cities Service Gas Company of the Commission order dated December 2, 1953, in Docket No. 44,079-C (C-3216) which requires the attribution of a minimum value of 11 cents per M. c. f. to natural gas at the wellhead as a condition precedent for withdrawing such gas from the Hugoton Gas Field in Kansas.

2. That Magnolia Petroleum Company is presently a producer of gas, lease owner and operator in the Hugoton Gas Field within the meaning of the Commission order referred to in Finding (1).

3. That Cities Service Gas Company is not a producer but is a purchaser of gas from the Kansas Hugoton Gas Field; that it purchases Hugoton gas from the producing companies and distributes said gas for resale. That, as stated in the above mentioned complaint, Cities Service purchases the gas therein described from Magnolia "after completion of production."

4. That the Commissioner's order of December 2, 1953, above outlined, is a conservation and prevention of waste order which deals only with the production of natural gas in the Kansas Hugoton Field.

5. That J. F. Austin and the Southwest Kansas Royalty Owners Association should be permitted to show cause, if any there be, at a public hearing herein, why the com-

plaint herein should not be dismissed as to Cities Service Gas Company.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That J. F. Austin and the Southwest Kansas Royalty Owners Association show cause, if any there be, at a public hearing hereinafter ordered, why the complaint herein should not be dismissed as to Cities Service Gas Company.

IT IS FURTHER BY THE COMMISSION ORDERED: That a public hearing be held in respect to the matters herein on Friday, June 29, 1956, at the Lassen Hotel, Wichita, Kansas, commencing at 9 o'clock a. m., or as soon thereafter as the same may be reached by the Commission.

That the Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

ga

Order

Now on this 18th day of July, 1956, the above-entitled matter comes further before the Commission on its own motion, and the Commission, having examined the petition and complaint filed herein, the oral motion of Cities Service Gas Company to dismiss with reference thereto, and having considered the arguments presented at the show cause hearing had on June 29, 1956, herein, finds:

1. That on June 13, 1956, this Commission entered its order to show cause directed at the petition and complaint filed herein setting the matter for hearing on June 29, 1956; that due notice of said hearing was given as pro-

vided by law to all persons interested therein; that J. F. Austin, the Southwest Kansas Royalty Owners Association, Magnolia Petroleum Company and Cities Service Gas Company all appeared by and through their respective counsel at said hearing and were heard. That the General Counsel of the Kansas Corporation Commission appeared on behalf of the Commission and the public generally. There were no other parties appearing.

2. That at the inception of said hearing Cities Service Gas Company made its oral motion to dismiss the petition and complaint in its entirety and urged as grounds therefore, in effect, that the order of December 2, 1953, in Docket No. 44,079-C (C-3216), involved herein, has been construed by courts of competent jurisdiction and by the Commission (1) to apply to purchasers of gas as well as to producers of gas (2) to apply to purchasers of gas taking delivery at the end of gathering and (3) as a price-fixing order regulating sales of gas at the wellhead and sales after gathering; that by reason of such prior construction this Commission now has no jurisdiction to construe or interpret said order in any other manner; and that such interpretation is binding on this Commission and, so construed, causes it to be in violation of Federal statutory and constitutional provisions relating to interstate commerce. That by being in violation of Federal laws in such cases made and provided, the Commission order of December 2, 1953, is void and of no force and effect. That since the Commission had no jurisdiction initially to promulgate such an order, it likewise now has no jurisdiction to construe it.

3. That under G. S. 1949, 55-706, proceedings may be instituted before the Commission upon petition of any interested party upon any question relating to the interpretation or the enforcement of any order of the Commission, or the determination of any right thereunder. That said

petition and complaint is a proper petition within the meaning of said statute and that the Commission has jurisdiction to entertain, hear and determine the same.

4. That under the rules of practice and procedure of this Commission complaints may be filed by parties who complain of any thing done or omitted to be done in violation of the orders of this Commission; that said petition and complaint conforms with said rules of practice of the Commission and the Commission has jurisdiction to entertain the same; that upon the filing of such complaint under said rules of practice and procedure the Commission will examine the same to ascertain whether the allegations, if true, establish a *prima facie* case.

5. That it is the duty of this Commission under such statute, upon proper petition, to interpret its own orders and determine rights thereunder and that in order to determine whether said complaint establishes a *prima facie* case against Cities Service Gas Company it is also necessary for the Commission under its rules of practice and procedure to interpret, construe and apply said order.

6. That after careful consideration of the Cities Service motion and all of the matters alleged therein, the Commission finds that it has never interpreted said order in the manner described in said motion to dismiss and that no court of competent jurisdiction has so interpreted it.

7. That said order dated December 2, 1953, is valid and subsistent and in full force and effect. It was within the jurisdiction of the Commission to make and under the statutes and rules of practice and procedure the Commission also has jurisdiction to interpret and enforce said order and determine rights thereunder.

8. That the "Hugoton Gas Field in Kansas" within the meaning of the order referred to in Finding 2 hereof is

an underground common source of supply of raw, natural gas located in porous limestone and dolomite formations at an average depth of 2700 to 2800 feet below the surface of the earth.

9. That the gas referred to in said order is raw, natural gas so located and so situated in said underground reservoir and common source of supply.

10. That Magnolia Petroleum Company takes such raw, natural gas and causes such natural gas to be taken from said underground reservoirs constituting the Hugoton Gas Field in Kansas and that it withdraws such raw, natural gas from said underground formations constituting said field; that it is a producer and lease owner, all within the meaning of said order.

11. That after Magnolia has taken or caused such raw, natural gas to be taken from said underground formations and after it has completed such taking and such withdrawal; and the production thereof, it sells said gas to Cities Service Gas Company.

12. That Cities Service Gas Company does not take gas or cause gas to be taken from the underground formations constituting such field and does not withdraw gas from said common source of supply, and is not a producer of gas or a lease owner, within the meaning of said order, but is rather a purchaser of gas from the producer thereof, namely, Magnolia Petroleum Company, and that after such purchase Cities Service Gas Company transports and distributes such gas for resale.

13. That the Commission's order of December 2, 1953, above-outlined, is a conservation order designed to prevent waste and to protect correlative rights with respect to such raw, natural gas and deals only with the production or with-

drawal, or conditions of production or withdrawal of such raw, natural gas in said field.

14. That the relief sought in paragraph numbered 1 of the prayer of said petition and complaint is as follows:

> "For an order directed to Magnolia and Cities Service, and each of them, requiring them to pay to Austin and all of the other landowners and royalty owners, with respect said leases, royalty based on 11 cents per M. c. f. (14.65 p. s. i. a.) retroactive to December 1, 1955, and that said takers of gas account to the Commission and report such payments as a condition precedent to the further taking of gas or the further causing of gas to be taken from said Field and as a condition precedent to further withdrawals from said common source of supply, and in the absence of such retroactive payments and accounting and report, that the Commission, by appropriate order, prevent any further taking or withdrawal by said two companies, or either of them."

15. That the motion of Cities Service Gas Company was urged on the additional ground that the Commission has no authority to enter an order such as sought in paragraph (1), above quoted, and that such an order would be, in effect, the granting of a money judgment.

16. After consideration of the contention of Cities Service in this respect, the Commission finds that its order of December 2, 1953, a conservation order, fixed no price for gas and established no rates; that an order such as that sought in said paragraph (1) of the petition could not recover back the gas, if any, withdrawn or taken from the field and wasted in violation of the order and would appear to have no reasonable relation to the ultimate objectives of the order, and, under the facts of this case, does not appear to be a proper penalty to be imposed for violations of the order, if any there be.

17. Insofar as it pertains to the relief sought in paragraph (1) of the prayer of the petition and complaint, the motion of Cities Service Gas Company should be sustained and that portion of the petition should be dismissed.

18. That the motion of Cities Service Gas Company to dismiss should be overruled in all other respects.

19. That J. F. Austin, the Southwest Kansas Royalty Owners Association and all other parties interested should be permitted to show further cause, if any there be, at the public hearing hereinafter ordered why the petition and complaint should not be dismissed as to Cities Service Gas Company.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That, insofar as it pertains to the relief sought in paragraph numbered 1 of the prayer of the petition and complaint, the motion of Cities Service Gas Company should be and it is hereby sustained, and that portion of the petition and complaint should be and it is hereby dismissed.

IT IS FURTHER BY THE COMMISSION ORDERED: That the motion of Cities Service Gas Company to dismiss should be and it is hereby overruled in all other respects.

IT IS FURTHER BY THE COMMISSION ORDERED: That J. F. Austin, the Southwest Kansas Royalty Owners Association and all other parties interested should be permitted to show further cause, if any there be, at a public hearing hereinafter ordered why the complaint herein should not be dismissed as to Cities Service Gas Company.

IT IS FURTHER BY THE COMMISSION ORDERED: That a public hearing be held in respect to the matters herein on the 24th day of August, 1956, at the Lassen Hotel, Wichita, Kansas, commencing at 9 o'clock a. m., or as soon thereafter as the same may be reached by the Commission.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

ga

Petition and Application for Rehearing

Come now J. F. Austin and the Southwest Kansas Royalty Owners Association, and state and move as follows:

1. On July 18, 1956, this Commission entered an order herein which found and held, in part, as follows:

"14. That the relief sought in paragraph numbered 1 of the prayer of said petition and complaint is as follows: 'For an order directed to Magnolia and Cities Service, and each of them, requiring them to pay to Austin and all of the other landowners and royalty owners, with respect said leases, royalty based on 11 cents per M. c. f. (14.65 p. s. i. a.) retroactive to December 1, 1955, and that said takers of gas account to the Commission and report such payments as a condition precedent to the further taking of gas or the further causing of gas to be taken from said Field and as a condition precedent to further withdrawals from said common source of supply, and in the absence of such retroactive payments and accounting and report, that the commission, by appropriate order, prevent any further taking or withdrawal by said two companies, or either of them.'

"15. That the motion of Cities Service Gas Company was urged on the additional ground that the Commission has no authority to enter an order such as sought in paragraph (1), above quoted, and that

such an order would be, in effect, the granting of a money judgment.

"16. After consideration of the contention of Cities Service in this respect, the Commission finds that its order of December 2, 1953, a conservation order, fixed no price for gas and established no rates; that an order such as that sought in said paragraph (1) of the petition could not recover back the gas, if any, withdrawn or taken from the field and wasted in violation of the order and would appear to have no reasonable relation to the ultimate objectives of the order, and, under the facts of this case, does not appear to be a proper penalty to be imposed for violations of the order, if any there be.

"17. Insofar as it pertains to the relief sought in paragraph (1) of the prayer of the petition and complaint, the motion of Cities Service Gas Company should be sustained and that portion of the petition should be dismissed.

"IT IS THEREFORE, BY THE COMMISSION ORDERED; That, insofar as it pertains to the relief sought in paragraph numbered 1 of the prayer of the petition and complaint. the motion of Cities Service Gas Company should be and it is hereby sustained, and that portion of the petition and complaint should be and it is hereby dismissed."

2. The records of this Commission show that said order was mailed to petitioners and complainants by the Conservation Division on July 24, 1956, and under Rule 82-1-8 of the Rules of Practice and Procedure, service was completed on July 26, 1956. This petition and application is filed pursuant to Rule 82-1-87 of said rules and Article 7 of Chapter 55 of the General Statutes of Kansas.

3. Petitioners and complainants are aggrieved by the portions of said order set forth above.

[APPENDIX]

4. Said order is unlawful and unreasonable for the reason that it fails to conform with *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, ... Okla. ....., 271 P. 2d 354, involving a similar question.

Involved in said case was the order of the State Corporation Commission of the State of Oklahoma, dated December 9, 1946, which provided, in part, as follows:

> "'1. That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma, at a price, at the wellhead of less than 7 cents per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.'" (271 P. 2d at 363.)

In said case Panoma sold natural gas taken from said field to Natural, and Natural refused to pay the price as provided in said order. Thereafter, Panoma, after demand for the same made upon Natural, which demand was refused, made an application to the State Corporation Commission of Oklahoma to require Natural to comply with said order and pay a wellhead price of 7 cents for gas taken or to be taken from Panoma's leases in said field. The Commission found, among other things, that Natural should pay Panoma the difference between the lesser amount actually paid for gas and the sum or price due at 7 cents; that strict enforcement of the price order was necessary for the prevention of waste; that the contract between Panoma and Natural could not impede or impair the effect of the order and that the acceptance of the contention that Natural need pay only the contract price would cause and invite discrimination and general breakdown of the regulation preventing waste.

As stated by the Supreme Court of Oklahoma (271 P. 2d at 358):

"Commission ordered in effect that Natural should pay for all gas received on and after January 1, 1951, at the sum and rate of 7 cents per thousand cubic feet at the wellhead. Commission further ordered that Natural should pay to Panoma a 'backpay' sum sufficient to equal 7 cents per thousand cubic feet for all gas taken by Natural prior to January 1, 1951, at a lesser price.

"Commission further ordered that if Natural should fail after 20 days to pay such 'back-pay' sum to Panoma, or should fail to pay as much as 7 cents wellhead price for gas taken after January 1st, 1951, that Panoma should cease any delivery of gas to Natural.

"On this appeal Natural contends as upon its response below, with the further contention that Commission's 'back-pay' order has the effect of a money judgment which Commission was not authorized to enter."

5. Said contention made in said cause by Natural is the identical contention made by Cities Service Gas Company herein, as described in the Commission's Finding No. 15, above quoted. In disposing of said contention adverse to the position of Cities Service in these proceedings, the Supreme Court of Oklahoma stated (271 P. 2d at 361-362, 363):

"We do not agree that the order of Commission was in any sense the rendition of a money judgment against Natural. It was merely a calculation and statement of the amount Natural should have paid for the gas taken before January 1, 1951, to comply with the price fixing order. There was no controversy as to the contract between the parties, nor as to the amount of gas Natural had received from the wells of Panoma, nor as to the amount Natural had paid on the purchase price thereof. By express provision of the contract, as well as by law, the contract was

modified by the price order and the minimum wellhead price of 7 cents became a part thereof and Natural was obligated by law to pay that price of 7 cents. The calculation and statement of this 'back pay' sum by Commission was merely a statement of the further sum Natural should pay to bring itself in full compliance with the minimum price requirement. Commission could not enforce it as a money judgment, however, this does not mean that Commission is without any power to enforce compliance with its valid price fixing order. As in case of any other valid order, Commission may require compliance therewith by any other order within its authority, so in this case, while Commission could not require Natural to pay this sum, it could prohibit Natural from taking further gas until it brought itself into compliance with the effective price order by making the payment. If it were otherwise Commission would be powerless to take any steps to require compliance with its valid orders in the highly important program of conservation, and might as well not make them.

"We hold that the order as to this 'back pay' sum was within the authority of Commission. . . .

"Since the Corporation Commission had authority to make price fixing orders without violating the federal Constitution, then further orders within its authority designed to enforce compliance with such orders would likewise involve no violation of the federal Constitution. To hold otherwise would bring about the result that the Corporation could and did make this specific price fixing order as applied to the Guymon-Hugoton field and the making of the order was not in violation of the federal Constitution, but that subsequent valid orders directing compliance with the price fixing order would so violate the federal Constitution. Such a conclusion, to say the least of it, would be most peculiar and quite illogical. Therefore, and upon the foregoing authorities we find no merit in this contention."

6. By reason thereof, the portions of the order set forth herein are contrary to law and decided cases and is unreasonable, improper and unfair.

Wherefore, petitioners and complainants move for an order granting them a rehearing with respect the portions of the order dated July 18, 1956, set forth herein.

Filed 3d day of August, 1956, State Corporation Commission for the State of Kansas, by Raymond B. Harvey.

Order

Now on this 10th day of August, 1956, the above-entitled matter comes before the Commission for further consideration upon the petition for rehearing filed herein by petitioners and complainants. The Commission, having reexamined its files and records and being fully advised in the premises, finds:

1. That the Commission's order of July 18, 1956, was a valid exercise of its authority.

2. That the petition for rehearing filed herein by petitioners and complainants, is without merit.

3. That said petition for rehearing heretofore referred to should be denied.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That the petition for rehearing by petitioners and complainants in this docket be and it is hereby denied.

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary*.

ga

Order

Now on this 31st day of August, 1956, comes on for hearing the show cause order heretofore entered in the above-captioned matter, J. F. Austin and the Southwest Kansas Royalty Owners Association being present by their attorneys, Howard Fleeson, Dale M. Stucky and A. E. Kramer; the Cities Service Gas Company being present by its attorneys, O. R. Stites, Joe Rolston and Mark H. Adams; Magnolia Petroleum Company being present by its attorney, Charles S. Lindberg. The Commission and the public generally appeared by C. C. Linley, General Counsel, and Harold E. Jones, Assistant General Counsel. No other appearances were made. Thereupon after having examined all of the files and pleadings pertaining hereto, hearing evidence and the argument of counsel, the Commission finds:

1. That due notice of the time, place and subject matter of this hearing has been given to everyone concerned and said notice of hearing is hereby approved.

2. That the Commission has jurisdiction of the parties and of the subject matter herein and has full authority to determine the issues presented at this time.

3. That as outlined in its show cause order hereinbefore entered the complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association should be dismissed as against Cities Service Gas Company.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That the complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association be, and the same hereby is, dismissed as against Cities Service Gas Company.

IT IS FURTHER BY THE COMMISSION ORDERED: That the hearing on the complaint of J. F. Austin and the South-

west Kansas Royalty Owners Association against Magnolia Petroleum Company be, and it hereby is, continued to a date later to be announced by the Commission.

Except as is herein stated, the Commission retains jurisdiction of the subject matter and of the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary.*

hp

Petition of Cities Service Gas Company for Rehearing

COMES Now Cities Service Gas Company, a party to the captioned proceedings and having appeared by counsel of record, Mark H. Adams, 202 Wheeler Kelly Hagny Building, Wichita, Kansas; O. R. Stites and Joe Rolston, 1063 First National Building, Oklahoma City, Oklahoma, and having participated in the captioned proceedings before the Commission and introduced and offered evidence therein hereby petitions this honorable Commission for a rehearing in the captioned proceedings with respect to the orders of the Commission wherein Commission under date of August 31, 1956, dismissed the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association as against Cities Service Gas Company and overruled and denied the motion of Cities Service Gas Company to dismiss the captioned proceedings in toto. In support of this petition for a rehearing, the facts and reasons for granting the same are as follows:

(1) The order of Commission dated August 31, 1956, dismissing the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association as to Cities Service Gas Company was based upon a purported

show cause order not authorized by law, statute or the Rules and Regulations of said Commission, but contrary thereto; is not based on substantial or competent evidence produced at any hearing before said Commission, but is contrary thereto; is an abuse and in excess of the discretionary powers of said Commission and constitutes unlawful and unreasonable action.

(2) Commission committed material and reversible error in not sustaining in toto petitioner's motion to dismiss the entire proceedings in the captioned matter for the reason that the record shows that this Commission has no jurisdiction or authority to entertain such proceedings. The particular grounds set forth in petitioner's motion to dismiss made in said proceedings and renewed at the close of said proceedings, are made a part hereof by reference.

(3) Commission committed material and reversible error in rejecting and refusing to receive in evidence the proferred testimony of petitioner's witnesses J. L. Willard and Russell W. Hofsess.

(4) The Commission's minimum gas price fixing order for the Kansas Hugoton Gas Field dated December 2, 1953, effective January 1, 1954, as evidenced by the clear language used therein is not ambiguous and by reason thereof is not subject to interpretation, construction or explanation by Commission.

(5) Assuming arguendo that Commission has the legal authority to interpret the aforesaid minimum gas price fixing order, the Commission erred in refusing to comply with petitioner's request at the hearing herein that it interpret the order as to its application to and effect upon the price Magnolia Petroleum Company was and will be required thereunder to charge this petitioner and which petitioner will be required to pay for gas produced by

Magnolia Petroleum Company in said Kansas Hugoton Gas Field and sold and delivered by Magnolia to petitioner under a gas purchase contract dated June 17, 1946, in which the parties had agreed to a price less than that provided in Commission's minimum price order. As the Commission well knows this petitioner is the largest taker of gas from said Kansas Hugoton Gas Field. The evidence proferred by petitioner was to the effect that petitioner had entered into a gas purchase contract with Magnolia Petroleum Company for the life of the production from approximately 100,269 acres of leaseholds in said field, upon which there have been drilled 156 producing gas wells, the gas from which is now being sold and delivered to petitioner by Magnolia under said subsisting gas purchase contract; that at the end of July, 1956, the estimated remaining gas reserves of said leasehold was 844,134,608 MCF; that the contract price for such gas for a period of fifteen years from and after the first delivery under said contract (this fifteen year period will not expire until 1963) is six cents (6¢) per M. c. f. on a pressure base of 16.4 psia; that during the year 1955 petitioner purchased from Magnolia under said contract in excess of 18,000,000 M. c. f. of gas or a daily average in excess of 50,000 M. c. f., and is currently taking gas at the same rate, which gas has been, prior to the promulgation of said price fixing order, and is now transported by petitioner in interstate commerce for resale. This evidence which was offered by petitioner and refused admittance by Commission clearly discloses the necessity that petitioner know and be fully informed as to the application and effect of said minimum gas price fixing order as applied to petitioner's purchases of gas under said contract from Magnolia. Petitioner contends that Commission is, for each and all of the reasons set forth in petitioner's motion to

dismiss the captioned proceedings in toto, without jurisdiction with respect to such proceedings. If the Commission has such jurisdiction, which petitioner denies, the refusal of Commission to comply with petitioner's request constitutes material and reversible error.

(6) Assuming arguendo that the Commission's order of dismissal as against Cities Service Gas Company constitutes an interpretation of said minimum gas price fixing order hereinbefore referred to, petitioner here asserts that Commission had no jurisdiction or authority to issue such interpretation because as evidenced by the record in the captioned proceedings, the District Court of Finney County, Kansas, in case No. 9934, entitled Cities Service Gas Company v. State Corporation Commission of the State of Kansas, *et al.*, determined said order, on Commission's motion to dismiss said proceedings, was applicable to the operations of petitioner in its purchase of gas in said Field, which motion of Commission to dismiss was overruled and denied by said District Court and no appeal or cross appeal has been or can be taken therefrom by Commission, and therefore Commission has no jurisdiction or authority to interpret said order to the contrary.

(7) Assuming arguendo that Commission's order of dismissal as applied to Cities Service Gas Company constitutes an interpretation of said minimum gas price fixing order heretofore mentioned, such interpretation is not authorized and is beyond the jurisdiction of the Commission because the Supreme Court of Kansas has already interpreted an order identical in form and content with said minimum gas price fixing order, except as to price, contrary to the Commission's purported interpretation.

(8) Commission's order dismissing the captioned proceeding as against Cities Service Gas Company without

any restriction or limitation therein denies petitioner due process of law because it precludes petitioner and denies petitioner the opportunity to be heard on that portion of said petition and complaint against Magnolia Petroleum Company, petitioner's supplier of gas from the Kansas Hugoton Gas Field.

(9) That while Commission's order of dismissal of captioned proceedings as to Cities Service Gas Company is dated August 31, 1956, petitioner does not know when said order was made and had no knowledge of such order or the contents thereof until September 13, 1956, the Commission's having wholly failed and neglected theretofore to serve on or make available to petitioner, a copy of such order. If it is determined that petitioner was required to file this its petition for rehearing within ten days from the date of said order of dismissal, then the failure of Commission as aforesaid to serve said order on petitioner as required by law and the rules and regulations of said Commission denies petitioner due process of law.

WHEREFORE, petitioner respectfully prays Commission for an order setting aside said order of dismissal as to petitioner alone and said order overruling petitioner's motion to dismiss such proceedings in toto hereinbefore referred to, granting petitioner a rehearing in the captioned proceedings, and upon such rehearing dismiss said proceedings in toto.

Filed 1st day of September, 1956, State Corporation Commission, for the State of Kansas, by R. B. Harvey.

Order

Now on this 24th day of September, 1956, comes on for consideration the petition of Cities Service Gas Company for rehearing in the above entitled matter with respect to

the order of the Commission under date of August 31, 1956, wherein it dismissed the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association as against Cities Service Gas Company.

The Commission having examined the files, pleadings and all other papers connected with said docket, and being fully advised in the premises, finds:

1. That the Commission order was served upon petitioner Cities Service Gas Company by mailing a copy thereof at Topeka, Kansas, on September 12, 1956, and that the application for rehearing herein is filed within ten (10) days after the completion of service of the Commission order upon petitioner and consequently is filed within the time prescribed by statute and by the Commission's rules in such matters made and provided.

2. That each of the matters set forth in said application for rehearing as reasons for the granting of the same have been duly considered by the Commission.

3. That the application for rehearing should be denied.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That the application for rehearing herein of Cities Service Gas Company with reference to the Commission's order dated August 31, 1956, wherein the petition and complaint of J. F. Austin and the Southwest Kansas Royalty Owners Association as against Cities Service Gas Company was dismissed, be, and the same hereby is, denied.

The Commission retains jurisdiction of the subject matter and of the parties for the purpose of entering such further order or orders as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

[SEAL] RAYMOND B. HARVEY, *Secretary*.

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS.

CITIES SERVICE GAS COMPANY, a corporation,

Plaintiff,

vs.

STATE CORPORATION COMMISSION OF KANSAS, HARRY SNYDER, JR., Chairman, RICHARD C. BYRD and JOHN I. YOUNG, as Members of Said Commission, and Their Respective Successors in Office,

Defendants.

No. 10320

Petition of Cities Service Gas Company for Judicial Review of Commission Order

COMES NOW plaintiff Cities Service Gas Company, and for its cause of action herein against the above named defendants, alleges and shows to the Court:

1. Plaintiff is now and has been during all times material herein a Delaware corporation, duly authorized to transact business in the State of Kansas as a foreign corporation, with its principal office and place of business in the First National Building, Oklahoma City, Oklahoma, and an operating office at Wichita, Kansas.

2. Plaintiff is now and has been during all times material herein a natural gas company as defined in the Natural Gas Act as amended (15 U. S. C. A. 717) and engaged generally in the business of producing and purchasing natural gas for transportation and sale in interstate commerce for resale under the provisions of said Act by means of an integrated pipeline system and facilities extending from Texas into and through Oklahoma and Kan-

sas and into Missouri and Nebraska. In operating its said interstate integrated pipeline system, and as an integral part thereof, plaintiff has, among other things, entered into contracts with certain producers in the Kansas-Hugoton Gas Field which are presently subsisting and have been subsisting during all times material herein for the purchase of natural gas produced in and from said Field, a part of such gas under said contracts being purchased at the wellhead in said Field and a part of such gas under said contracts being purchased from producers and delivered to plaintiff at its pipeline after such producers had produced and gathered such gas. After such gas is purchased by plaintiff, it is transported and sold along with other gas it produces and purchases for resale both in interstate and intrastate commerce in Kansas and other states. Included in the gas purchase contracts hereinabove mentioned is one with Magnolia Petroleum Company, a producer within the Kansas Hugoton Field. This contract, dated June 17, 1946, covers approximately 100,269 acres of leaseholds in the Kansas Hugoton Field upon which there are presently 156 producing gas wells with an estimated remaining gas reserve of approximately 844,134,608 M. c. f. This contract, dated June 17, 1946, provides for the sale of gas from such leaseholds as long as the wells thereon are commercially productive. It further provides for a price of six cents (6¢) per M. c. f. on a pressure base of 16.4 p. s. i. a. for the first fifteen (15) years after such contract became effective or until 1963.

3. Under date of August 31, 1956, the defendants, purporting to act in their official capacity as the Corporation Commission of the State of Kansas, (hereinafter called "Commission"), promulgated and issued its Findings and Order in Docket No. 52,417(C) (C-5040), reading in part, as follows:

"That as outlined in its Show Cause Order hereinbefore entered, the complaint of J. F. Austin and The Southwest Kansas Royalty Owners Association should be dismissed as against Cities Service Gas Company.

"IT IS THEREFORE BY THE COMMISSION ORDERED: The Complaint of J. F. Austin and The Southwest Kansas Royalty Owners Association be, and the same hereby is, dismissed as against Cities Service Gas Company.

"IT IS FURTHER BY THE COMMISSION ORDERED: That the hearing on the Complaint of J. F. Austin and The Southwest Kansas Royalty Owners Association against Magnolia Petroleum Company be, and it hereby is, continued to a date later to be announced by the Commission."

The aforesaid Order, though dated August 31, 1956, was not served upon plaintiff until September 13, 1956, and the plaintiff had no notice or knowledge thereof until September 12, 1956.

4. After the issuance and service of said Order and within the time and in the manner prescribed by G. S. 1949, 55-606, plaintiff duly filed with the Commission its Petition for Rehearing. Thereafter, and on September 21, 1956, Commission denied plaintiff's said Petition for Rehearing.

5. On December 2, 1953, the defendant commission promulgated and issued a minimum gas price-fixing order for the Kansas Hugoton Gas Field, which said order provided, in part, as follows:

"IT IS FURTHER BY THE COMMISSION ORDERED: That all persons, firms or corporations which take gas or cause gas to be taken from the Hugoton Gas Field in Kansas on and after January 1, 1954, 12:01 a. m., shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to

all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per M. c. f. (14.65 pounds p. s. i. a.) at the wellhead until further order or orders of this Commission."

Plaintiff contested the issuance of the said Order and duly filed its Petition for Judicial Review of said Order, in this Court, in Docket No. 9934. During the pendency of such action and before trial thereof on its merits, the defendants filed a Motion to Dismiss such action upon the ground, among others, that the said Order did not apply to or affect the operations of this plaintiff because it was only a purchaser of gas within the said Field and therefore had no justiciable issue and was not a proper party to prosecute such appeal. After hearing upon said motion, the same was by the court overruled and denied. Subsequently thereto and on April 26, 1956, this Court entered its judgment wherein it upheld and sustained the minimum gas price-fixing order hereinabove described.

6. Thereafter and within the time prescribed by statute, the plaintiff duly appealed the judgment of this Court, hereinabove described, which said appeal is now pending and undetermined in the Supreme Court of the State of Kansas. The defendants did not cross appeal from any order or judgment of this Court although the time for so doing has passed and expired.

7. On or about June 8, 1956, one J. F. Austin, an individual, and The Southwest Royalty Owners Association filed a so-called "Petition and Complaint" with the defendant commission against this plaintiff and Magnolia Petroleum Company (sometimes hereinafter referred to as "Magnolia"), wherein it was alleged in substance that

plaintiff and Magnolia were in violation of the aforesaid minimum gas price-fixing order because the said J. F. Austin and certain other royalty owners under leases covered by Magnolia's contract with Cities were being paid royalty in an amount less than the price provided in said minimum gas price-fixing order. In said petition the defendant commission was requested to make certain orders with reference to the payment of royalty, both retroactively and prospectively, and the said petition further prayed "for such other and further relief to which petitioners and complainants may be entitled, and for such further orders as may be necessary for the implementation, interpretation and enforcement of said Order dated December 2, 1953.

8. Under date of June 13, 1956, the defendant commission issued a so-called "Order to Show Cause" in the above proceedings, under Docket No. 52,417-C (C-5040) wherein it was stated, in substance, that the Petition and Complaint hereinabove described had been filed with the Commission; that Magnolia is presently a producer of gas, lease-owner and operator in the Kansas Hugoton Gas Field within the meaning of the minimum gas price-fixing order hereinabove mentioned; that Cities Service Gas Company is not a producer but is a purchaser of gas from the Kansas Hugoton Gas Field; that J. F. Austin and The Southwest Kansas Royalty Owners Association should be permitted to show cause, if any there be, at a public hearing, why the complaint should not be dismissed as to Cities Service Gas Company. It was therein ordered, in substance, that a public hearing be held on June 29, 1956, as to why the aforesaid complaint should not be dismissed as to Cities Service Gas Company.

9. On June 29, 1956, the aforesaid proceedings came on for hearing before the Commission, as ordered, and at

the beginning of the said hearing plaintiff moved to dismiss the Petition and Complaint of J. F. Austin and The Southwest Kansas Royalty Owners Association and all proceedings had or proposed thereon and to deny all relief requested by the pleadings on file for the reason that the defendant commission had no jurisdiction or authority to entertain the Petition and Complaint of the royalty owners or to enter any order therein. Such motion was taken under advisement by the Commission until July 18, 1956, at which time the defendant commission issued its Order, providing in part:

> "IT IS THEREFORE BY THE COMMISSION ORDERED: That, insofar as it pertains to the relief sought in paragraph numbered 1 of the prayer of the Petition and Complaint, the motion of Cities Service Gas Company should be and it is hereby sustained and that portion of the Petition and Complaint should be and it is hereby dismissed."
>
> "IT IS FURTHER BY THE COMMISSION ORDERED: That the motion of Cities Service Gas Company to dismiss should be and it is hereby overruled in all other respects."

10. Thereafter and on August 31, 1956, the above proceedings came on for further hearing upon an Order directed to J. F. Austin and The Southwest Kansas Royalty Owners Association to show cause why their Petition and Complaint should not be dismissed as to Cities Service Gas Company. At the said hearing plaintiff entered its appearance and renewed its Motion to Dismiss the Petition and Complaint in its entirety, which motion was by defendant denied, and at such hearing plaintiff objected to its being dismissed from the proceedings for the reason that such action necessarily involved an interpretation by the Commission of its minimum gas price-fixing order, hereinabove mentioned, and that the defendant commission was

utterly without legal authority to now make any interpretation of such order. Plaintiff's objection was overruled, at which time it introduced certain testimony and exhibits, and certain other testimony and exhibits proffered by plaintiff were refused by the defendant commission. At the conclusion of the said hearing the record was closed and the matter taken under advisement and thereafter and upon the same date of said hearing the Commission issued its order dismissing plaintiff from the said proceedings hereinabove set out.

11. Plaintiff, in further support of its Petition for Judicial Review herein, states:

(a) The order of Commission dated August 31, 1956, dismissing the petition and complaint of J. F. Austin and The Southwest Kansas Royalty Owners Association as to Cities Service Gas Company was based upon a purported show cause order not authorized by law, statute or the Rules and Regulations of said Commission, but contrary thereto; is not based on substantial or competent evidence produced at any hearing before said Commission, but is contrary thereto; is an abuse and in excess of the discretionary powers of said Commission and constitutes unlawful and unreasonable action.

(b) Commission committed material and reversible error in not sustaining in toto petitioner's motion to dismiss the entire proceedings in the captioned matter for the reason that the record shows that this Commission has no jurisdiction or authority to entertain such proceedings. The particular grounds set forth in petitioner's motion to dismiss made in said proceedings and renewed at the close of said proceedings, are made a part hereof by reference.

(c) Commission committed material and reversible error in rejecting and refusing to receive in

evidence the proffered testimony of petitioner's witnesses J. L. Willard and Russel W. Hofsess.

(d) The Commission's minimum gas price fixing order for the Kansas Hugoton Gas Field, dated December 2, 1953, effective January 1, 1954, as evidenced by the clear language used therein, is not ambiguous and by reason thereof is not subject to interpretation, construction or explanation by Commission.

(e) Assuming arguendo that Commission has the legal authority to interpret the aforesaid minimum gas price fixing order, the Commission erred in refusing to comply with petitioner's request at the hearing herein that it interpret the order as to its application to and effect upon the price Magnolia Petroleum Company was and will be required thereunder to charge this petitioner and which petitioner will be required to pay for gas produced by Magnolia Petroleum Company in said Kansas Hugoton Gas Field and sold and delivered by Magnolia to petitioner under a gas purchase contract dated June 17, 1946, in which the parties had agreed to a price less than that provided in Commission's minimum price order. As the Commission well knows, this petitioner is the largest taker of gas from said Kansas Hugoton Gas Field. The evidence proffered by petitioner was to the effect that petitioner had entered into a gas purchase contract with Magnolia Petroleum Company for the life of the production from approximately 100,269 acres of leaseholds in said field, upon which there have been drilled 156 producing gas wells, the gas from which is now being sold and delivered to petitioner by Magnolia under said subsisting gas purchase contract; that at the end of July, 1956, the estimated remaining gas reserves of said leasehold was 844,134,608 M. c. f.; that the contract price for such gas for a period of fifteen years from and after the first delivery under said contract (this fifteen year period will not expire until 1963) is six cents (6¢) per M. c. f. on a pressure base

of 16.4 p. s. i. a.; that during the year 1955 petitioner purchased from Magnolia under said contract in excess of 18,000,000 M. c. f. of gas or a daily average in excess of 50,000 M. c. f., and is currently taking gas at the same rate, which gas has been, prior to the promulgation of said price fixing order, and is now transported by petitioner in interstate commerce for resale. This evidence which was offered by petitioner and refused admittance by Commission clearly discloses the necessity that petitioner know and be fully informed as to the application and effect of said minimum gas price-fixing order as applied to petitioner's purchases of gas under said contract from Magnolia. Petitioner contends that Commission is, for each and all of the reasons set forth in petitioner's motion to dismiss the captioned proceedings in toto, without jurisdiction with respect to such proceedings. If the Commission has such jurisdiction, which petitioner denies, the refusal of Commission to comply with petitioner's request constitutes material and reversible error.

(f) Assuming arguendo that the Commission's order of dismissal as against Cities Service Gas Company constitutes an interpretation of said minimum gas price fixing order hereinbefore referred to, petitioner here asserts that Commission had no jurisdiction or authority to issue such interpretation because as evidenced by the record in the captioned proceedings, the District Court of Finney County, Kansas, in case No. 9934, entitled Cities Service Gas Company v. State Corporation Commission of the State of Kansas, et al., determined said order, on Commission's motion to dismiss said proceedings, was applicable to the operations of petitioner in its purchases of gas in said Field, which motion of Commission to dismiss was overruled and denied by said District Court and no appeal or cross appeal has been or can be taken therefrom by Commission, and, therefore, Commission has no jurisdiction or authority to interpret said order to the contrary.

(g) Assuming arguendo that Commission's order of dismissal as applied to Cities Service Gas Company constitutes an interpretation of said minimum gas price fixing order heretofore mentioned, such interpretation is not authorized and is beyond the jurisdiction of the Commission because the Supreme Court of Kansas has already interpreted an order identical in form and content with said minimum gas price fixing order, except as to price, contrary to the Commission's purported interpretation.

(h) Commission's order dismissing the captioned proceeding as against Cities Service Gas Company without any restriction or limitation therein denies petitioner due process of law because it precludes petitioner and denies petitioner the opportunity to be heard on that portion of said petition and complaint against Magnolia Petroleum Company, petitioner's supplier of gas from the Kansas Hugoton Gas Field.

(i) The Commission erred in refusing to receive in evidence plaintiff's Exhibit No. 5, offered in evidence at the hearing before said Commission on August 31, 1956.

(j) The Commission erred in overruling plaintiff's Petition for Rehearing.

12. That by reason of the foregoing, the said Commission's Orders of August 31, 1956 and September 24, 1956, dismissing plaintiff from the proceedings in Docket No. 52,417-C, aforesaid, and denying plaintiff's Petition for Rehearing, are unlawful, unreasonable, arbitrary, unconstitutional and null and void.

WHEREFORE, plaintiff prays:

(A) That the Court take jurisdiction of this action and judicially review the aforesaid orders of the defendant commission dated August 31, 1956 and September 24, 1956, aforesaid, and the findings upon which the same are based,

and enter a judgment setting aside said orders and the findings therein made and declare said orders ineffective, unconstitutional and void.

(B) In the alternative, that this action be remanded in the interest of justice to the Commission with directions that the same be further investigated and additional evidence taken by the Commission.

(C) That this Court independently review the record and make its own findings of fact and conclusions of law, including among other things, the question as to whether under the facts as shown by the record, the aforesaid minimum gas price fixing order applies to the operations of plaintiff.

(D) That this action be advanced over any other civil cause of a different nature pending before this Court and be heard and determined as promptly and expeditiously as possible.

(E) That the Court grant plaintiff such further and additional relief as is authorized by the provisions of law.

Filed October 4, 1956.